Supreme Court, U. S.
FILED
MAR 27 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PAUL L. DOUGLAS,
Attorney General of Nebraska,

MELVIN KENT KAMMERLOHR,
Assistant Attorney General of Nebraska,

2119 State Capitol,
Lincoln, Nebraska 68509
Telephone: (402) 471-2211

Attorneys for Petitioner.

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

	Page
Petition for Writ of Certiorari	1
Opinions Below	1
Grounds for Jurisdiction	2
Questions Presented for Review	2
Constitutional Provisions and Statutes Involved	4
Statement of the Case	8
Reasons for Allowing the Writ	13
Appendix 1	App. 28
Appendix 2	App. 58
Appendix 3	App. 98

CASES CITED

Aguilar v. Texas, 378 U. S. 108 ..... 15, 25, 34, 35, 36, 39, 40, 41, 63, 64, 65, 66, 72

Bivens v. Six Unknown Federal Narcotics Agents, 403 U.S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (June 1971) 14

Coolidge v. New Hampshire, 403 U.S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) 24, 38, 83, 85

Draper v. United States, 358 U.S. 307; 3 L. Ed. 2d 327, 79 S. Ct. 329 ..... 15, 23, 25, 37, 38, 61, 62, 64, 76

Goham v. Wolff, 471 F. 2d 52 ..... 27, 46

Johnson v. New Jersey, 384 U.S. 719 (1966) 18

CASES CITED—Continued

Pages

Kaufman v. United States, 394 U. S. 217 15

Michigan v. Tucker, — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357 ..... 3, 15, 17, 18, 19, 20, 55

Rice v. Wolff, Jr., No. 74-1682 (Appendix 1) 20, 21

Schneckloth v. Bustamonte, 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973) 15

Spinelli v. United States, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 ..... 23, 25, 35, 37, 40, 41, 64, 65, 66

State v. Dussault, 193 Neb. 122, — N. W. 2d — (1975) 25

United States v. Calandra, — U. S. —, 94 S. Ct. 613 ..... 15, 19

United States v. Harris, 403 U. S. 573 ..... 15, 41, 42, 62, 63, 66, 67, 68, 75

Whiteley v. Warden, 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 ..... 24, 36, 37, 38, 61, 62

Warden v. Hayden, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 ..... 21, 25, 51, 52, 83

CONSTITUTIONS CITED

United States Constitution, Amendment IV 3, 5, 17, 18, 19, 21, 22, 24, 36, 48, 57, 60, 75, 82, 83, 86

United States Constitution, Amendment V 3, 18, 19, 20

United States Constitution, Amendment IX 8

CONSTITUTIONS CITED—Continued

Pages

United States Constitution, Amendment X 8

United States Constitution, Amendment XIV 4

STATUTES CITED

Section 23-2401, et seq., R. R. S. Neb. 1943 16

Section 81-8, 209, et seq., R. R. S. Neb. 1943 16

28 U. S. C. § 2254 ..... 3, 5, 8, 14, 16, 29, 43, 61

TEXTS CITED

Rule 19 of the Supreme Court of the United States ... 13

The Urban Police Function, Rule 5.4, A. B. A. Standards, Approved Draft 1973 16

IN THE

Supreme Court of the United States

No. ....

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Your petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above entitled case on January 28, 1975.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported. A copy of

such opinion is separately attached hereto in Appendix No. 1.

The opinion of the United States District Court for the District of Nebraska which was affirmed by the United States Court of Appeals for the Eighth Circuit also is not yet reported and a copy thereof is set forth hereto in Appendix No. 2.

GROUNDS FOR JURISDICTION

The judgment sought to be reviewed was entered by the United States Court of Appeals for the Eighth Circuit on January 28, 1975. Appendix 1. This judgment affirmed the judgment of the United States District Court for the District of Nebraska entered July 5, 1974 and March 30, 1974.

Petition for rehearing and suggestion for rehearing en banc was denied by the United States Court of Appeals for the Eighth Circuit on February 19, 1975, copy of which is set forth in Appendix 3.

The statutory provision believed to confer on the United States Supreme Court jurisdiction to review the judgment in question by writ of certiorari is 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED FOR REVIEW

1. Should the suppression or exclusionary rule be modified to admit relevant, competent evidence obtained under the most exigent circumstances in the exercise of the utmost good faith by the police and courts where use of the rule could serve no deterrent effect or any other valid purpose?

2. Did not this court in *Michigan v. Tucker*, — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357, modify the excusionary rule in relation to the Fifth Amendment and by implication the Fourth (or if not, should it not), when its invocation can only punish an innocent error and can have no deterrent or other useful purpose?

3. May it not be reasonable under extremely exigent conditions which portend further bombing, killing and civil disorder for police to enter a known hangout of a youth for whom the police have a valid arrest warrant for allegedly setting a booby trap bomb which killed a police officer, injured others and destroyed a house and at which time the police also have a warrant (later held invalid) to search said known hangout for explosives, when the police do not have probable cause to believe the youth is or is not there at the time of entry?

4. When police are in possession of sufficient facts to obtain a valid search warrant but fail to set forth enough in the affidavit or other evidence before the issuing magistrate, and the warrant issues anyway, may the deficiency be cured by additional probable cause evidence at the suppression hearing?

5. When the state courts find a search warrant valid and thus never consider the validity of the search without a warrant, although presented as an alternative in briefs on direct appeal to the State Supreme Court, shouldn't the Federal District Court send the issues of search without a warrant and probable cause to enter to execute an arrest warrant back to the state trial court for exhaustion when said Federal Court finds the search warrant invalid in a Section 28 U. S. C. 2254 proceeding?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(3) 28 U. S. C. § 2254:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall

produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

(4) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

STATEMENT OF THE CASE

David L. Rice commenced this 28 U. S. C. § 2254 proceeding in the Federal District Court for the District of Nebraska contending primarily that his conviction of first

degree murder was invalid because it was based in part upon evidence consisting of dynamite, dynamite caps, and other tools and paraphernalia taken from his home at 2816 Parker Street, Omaha, Nebraska and dynamite particles found in his clothing at the police station which were the result of an illegal search and seizure and the fruits thereof and should have been suppressed. David L. Rice was the minister of information of the National Committee to Combat Fascism, an offshoot of the Black Panthers, and both names were used interchangeably in the case.

His conviction for first degree murder together with one Edward Poindexter, Chairman of the National Committee to Combat Fascism, was the outgrowth of the events discussed below.

About 2:05 a.m., August 17, 1970, the radio dispatcher at the Omaha, Nebraska Police Department received a call from a 911 operator indicating that a woman was screaming at 2865 Ohio Street, a vacant house. He dispatched two patrol cars and another patrol car subsequently arrived at said address. The officers entered the house and began to look around. There was a suitcase lying flat in the doorway which blocked the entire doorway and the officers had to step over it to enter. Officer Minard was directly over the suitcase when it exploded, killing him, and injuring several other officers and demolishing the house.

The Omaha Police Department for a two-year period before the bombing had built a file on the National Committee to Combat Fascism including newspapers published by said organization and were familiar with a number of

articles in said newspapers written by Edward Poindexter and David L. Rice advocating violence against the Omaha Police Department including killing of policemen.

A number of witnesses saw Duane Peak, a 15 year old member of the National Committee to Combat Fascism, carrying a heavy suitcase generally identified as similar to the one used in the bombing and he had warned a number of other people to keep away from the suitcase. In addition, the voice on the tape at police headquarters of the person making the 911 call that a woman was screaming at the place of the bombing was identified by a number of persons as that of Duane Peak. Donald Peak, Duane's brother, told the police about 1:45 p.m., August 22, 1970, that his brother Duane admitted to him the placing of the boobytrapped bomb and that Duane was transporting the bomb for someone in the Black Panther party. A report filed by two Omaha policemen, on Saturday, August 22, 1970, at 6:30 o'clock p.m., stated that Duane Peak's sister, Teresa Arlene, age 19 years, earlier told them that the day before the funeral of Officer Minard, Duane Peak was at her home and told her that he put the bomb in the house that killed the policeman and that he had carried the suitcase from the Panther headquarters. There are voluminous police reports supporting many of the contentions all of which were admitted in evidence by stipulation.

Late in the afternoon of August 22, 1970, arrest warrants were issued for Duane Peak and Edward Poindexter on murder charges.

Late that afternoon a task force set out from the Omaha Police Department to execute the arrest warrants

and first searched the Black Panther or NCCF headquarters on Ohio Street in Omaha where they found barricaded windows and doors and a large amount of ammunition and firearms. They next went to Poindexter's house at 3528 North 29th Street in Omaha and to the house of Duane Peak's cousins, Frank and Will Peak, at all of which places they were unsuccessful. They then proceeded to the premises of appellee David L. Rice at 2816 Parker Street. The house where Rice resided was more than a residence. There was a spoked hubcap hanging above the door and directly above that there was a black flag flying day and night; there was a green light burning at night, and in the windows there were posters of known Black Panther figures such as Huey Newton and others.

The police knew that on various occasions numerous people stayed at the Rice house and that Duane Peak was frequently there.

During the period of five days between the bombing and the search for Peak and Poindexter the police department was working extra shifts, they were very concerned for the safety of the public and themselves from further bombings, that the NCCF might eliminate Duane Peak before the police could find him and about entering the sensitive neighborhood area around the Rice premises.

When the police arrived at the Rice house the lights were on and the television set was playing inside the house. Officers knocked at the door and received no answer. The officers in charge then conferred and having information that explosives, including dynamite,

might be found in the Rice premises (and knowing the history of Rice and his philosophies previously recited) decided to have the house surrounded while the two officers left to attempt to get a search warrant. They obtained a search warrant from a magistrate who is admitted to the Nebraska Bar and returned in about an hour and finding the house still empty, entered it, looking for Duane Peak to execute the arrest warrant and thinking they had a right to search under the search warrant. The evidence which was obtained, mentioned earlier, was all in plain view in the house and was most probative.

Five days later, David Rice turned himself into the Omaha police. The usual procedure for taking and cataloging his clothes, giving him a shower and jail clothes was followed and on the same date his clothing was sent to Washington, D. C., for analysis and dynamite particles were found in the cuffs of his clothing.

The state district court and the Supreme Court of Nebraska held the search warrant valid. The Federal District Court for the District of Nebraska found the affidavit for search warrant insufficient. Although the issue of the validity of the search without a warrant or the entry on the premises looking for Duane Peak was presented by both sides to the state Supreme Court, it was never necessary for the state courts to go into this issue.

The Federal District Court after finding the affidavit for a search warrant invalid further found that it was not necessary to send the case back to the state trial court to take additional testimony and pass upon the issues of probable cause to enter to execute the arrest warrant or

probable cause to make a search without a warrant to meet exhaustion requirements.

The Federal District Court then held an additional evidentiary hearing on these issues and held in effect that the police must have had probable cause to believe Duane Peak was on the premises at the time of the entry and that this requirement was not affected by the exigency of the circumstances nor the good faith of the officers. The court refused to consider the question of reasonableness in view of the extreme emergency interests of the state as compared to the relatively minor invasion into an unoccupied house with lights and television on and no response to the knock. The United States Court of Appeals for the Eighth Circuit affirmed stating in part that the exclusionary rule was still in effect and that it had no authority to disregard it.

REASONS FOR ALLOWING THE WRIT

1. The Exclusionary Rule Should Be Modified.

Clearly, the kinds of reasons for granting a petition set forth in Rule 19 of this court governing review by certiorari do not apply in a case such as this; but we most urgently contend that the reasons why this court should grant this petition are as compelling as any suggested by said Rule 19 and, when the ramifications of the exclusionary rule are considered, the reasons for granting this petition rank alongside, we contend, some of the most important and serious concerns of this court and this nation. Untold guilty defendants go free; crime continues its forward march; court calendars at all levels, not to mention police departments, prosecutors' and attor-

neys' general offices become more jammed, and state-federal relations become more strained.

Obviously the deterrence goal of the exclusionary rule was completely nonexistent or irrelevant to the present case. The police acting under terrific pressure from public reaction, indignation, fear, anger and probably revenge, nevertheless did everything in their power to try to comply with the law and yet stubbed their toe (arguable) in attempting to get a search warrant, and even this would be disputed by nine state court judges. Obviously when the rule is so difficult to comply with that it takes reflection by nine jurists after the fact to determine it, there can be no element of deterrence of the police who are trying to comply. Deterrence should be a goal against police acting with ill will or bad faith but there is no hint of such an element in this case.

Of course, this court is well aware of the discussion of the problem by the Honorable Mr. Chief Justice Burger dissenting in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 (June 1971) and particularly the illogic of inflicting the same penalty of exclusion in all the various gradations of conduct of the police from good faith over to Gestapo tactics or in believing that the police will suffer from suppression; the prosecutor may suffer—certainly society and the nation suffers.

This court is also familiar with utterances of displeasure by individual members of this court not only with the exclusionary rule but with a system where a single federal court judge often overturns two or more tiers of state courts in Section 2254 cases not involving

any question of innocence or any other sound reason with any historical foundation; for example, Mr. Justice Powell, joined by Mr. Chief Justice Burger and Mr. Justice Rehnquist and partial agreement by Mr. Justice Blackmun in *Schneckloth v. Bustamonte,* 412 U. S. 218 at 250, 36 L. Ed. 2d 854, 93 S. Ct. 2041 (1973), and Mr. Justice Harlan, and Mr. Justice Stewart dissenting in *Kaufman v. United States,* 394 U. S. 217, 246 (with which Mr. Justice Blackmun also expressed agreement) advocating limitations on collateral attack in search and seizure cases. It would also be a monumental task to document the references and discussions of the honorable members of this court and the entire federal and state court systems of the inconsistencies and difficulties in attempting to reconcile or comply with *Aguilar v. Texas,* 378 U. S. 108; *Spinelli v. United States,* 393 U. S 410; *Draper v. United States,* 358 U. S. 307; *United States v. Harris,* 403 U. S. 573, and others together with the court's more recent refusals to extend the exclusionary rule in *United States v. Calandra,* — U. S. —, 94 S. Ct. 613 and *Michigan v. Tucker,* — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357. It is obvious that the law is now so difficult that the most conscientious policeman or even prosecutor could have his valid evidence suppressed under the exclusionary rule even though trying with all of his ability to comply. There can be no deterrence under such circumstances.

As the court also well knows, there have been untold law review articles written concerning the exclusionary rule almost all of which agree there must be a better way absent bad faith on the part of law enforcement. There is available now, not only criticism but also con-

siderable documentation and some statistics showing its ineffectiveness in accomplishing the stated goal as well as a number of suggested alternatives. One such alternative, along the lines suggested by the Honorable Chief Justice Burger, was enacted in Nebraska in 1969 in the form of the Political Subdivision Tort Claims Act, Sections 23-2401 et seq., R. R. S. 1943 and the State Tort Claims Act, Sections 81-8,209 et seq., R. R. S. Neb. 1943, both waiving sovereign immunity. If need be, further sanctions such as fines could be enacted to restrict the individual policeman, his superiors and employers. Police officers could be suspended or fired. Further controls are suggested by the A. B. A. Standards, *The Urban Police Function*, Rule 5.4, Approved Draft, 1973.

Guilt or innocence should not be fused with the dissimilar question of a possible violation of the Fourth Amendment. The exclusionary rule is an attempt to vindicate the violation of a civil right in a criminal trial. They should be separated into two causes of action. Because of the rule this court and countless other courts have had to reverse convictions of some of the most heinous criminals in recent years through exclusion of hard, valid, probative evidence. As soon as a state case is brought by Section 2254 to Federal Court on a search and seizure question the positions of the parties change. The police go on trial to defend their methods used in gathering valid evidence while the guilt of the convicted petitioner is not at issue. Even though the criminal has had a suppression hearing and usually two reviews in state courts.

Now, we present a case where a known member who personally advocated violent killing of police, of an organization also advocating the killing of policemen, who was convicted of conspiracy to commit murder in the violent killing of a policeman, where there is no hint of innocence, who has had a suppression hearing and review, and who expects to go free by invocation of the exclusionary rule for a violation of the Fourth Amendment, done if at all, by police and a lawyer magistrate trying to comply with the law of arrest, search and seizure. The time to end the era of our history when such heinous criminals go free because of the operation of the exclusionary rule has come. There is practically unanimity in the segment of the legal field which deals with these matters that the rule is not working; that it must be changed; that it has had sufficient time to prove itself, and has failed. The past damage can't be repaired, but nothing can be gained by waiting any longer to effect the inevitable change we all know must come.

2. Should not Michigan v. Tucker, — U. S. —, 41 L. Ed. 2d 182, 94 S. Ct. 2357, Prevent Exclusion of the Evidence in This Case?

The application of the exclusionary rule has recently been put in a more realistic context in the opinion of the majority of this court in *Michigan v. Tucker*. With regard to the concept of penalizing police errors through the sanction of the exclusion of evidence, the court stated:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes makes no errors whatsoever. The pres-

sures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." (94 S. Ct. at 2365.)

Tucker involved the question of whether the testimony of a third-party witness, whose existence became known to the police only through the statements of a rape suspect who had concededly been improperly advised of his rights pursuant to the requirements of *Miranda v. Arizona*, 384 U. S. 436 (1966), should have been suppressed.[1] The court held that the testimony of the third-party witness was properly admissible and not the "fruit of the poisonous tree."

Tucker then, was decided in the context of the application of the Fifth Amendment; however, the opinion makes it clear that the same consideration espoused by the court in the paragraph from the opinion quoted above are equally applicable to Fourth Amendment issues, such as those which are presented in the instant case. Thus, the court, in *Tucker*, continued:

> "We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.'

---

1 Actually **Miranda** had not been decided when the statements in question were obtained; however, since the interrogation took place pre-**Miranda** but the trial of the accused took place after the **Miranda** decision, **Miranda** was applicable to the case under the doctrine of **Johnson v. New Jersey**, 384 U. S. 719 (1966).

United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. We then continued:

> "'"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217 [4 L. Ed. 2d 1669, 80 S. Ct. 1437] (1960).' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. (Footnote omitted.)

"In a proper case this rationale would seem applicable to the Fifth Amendment context as well." (94 S. Ct. at 2365.)

There seems to be little doubt, then, that, in the eyes of the Supreme Court majority in *Tucker*, considerations of the validity of sanctions against the police in the form of exclusion of evidence apply equally to Fourth and Fifth Amendment questions.

Significantly, for the purposes of the issues presented in the instant case and for the arguments made in this brief, the court's opinion in *Tucker* stressed the fact that the concept of deterrence of improper police conduct, upon which the exclusionary rule is based, and the question of whether the police were acting in good faith are inextricably intertwined. The *Tucker* opinion continued:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in

> complete good faith, however, the deterrence rationale loses much of its force." (94 S. Ct. at 2365.)

This pronouncement lies at the heart of the instant case. We submit that it would be difficult to discover a case in which the police were acting in *more* good faith or one in which the supposed deterrent against future "misconduct" would be *less,* should the decision of the lower court suppressing the evidence in this case be sustained.

There is even more reason for such abstention in a search and seizure case where there is no question as to the validity of the evidence seized as contrasted to the possibility of the confession being tainted in a Fifth Amendment case.

However, the United States Court of Appeals for the Eighth Circuit in the present case indicated in part III of its opinion that it was still bound by prior holdings of the United States Supreme Court rejecting a plea for an application of *Michigan v. Tucker* when it stated:

> "But the court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law."

It then proceeded to allude to some negligent conduct on the part of the Omaha police in conducting a widespread investigation in disregard of the constitutional rights of others, whereas in reality, the evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises. (*Rice v. Wolff, Jr.*, No. 74-1682, Appendix 1, p. 55). The only place entered prior to going to the Rice premises was the NCCF headquarters.

3. Should Not "Reasonableness" Under All the Circumstances Be the Test For A Search With a Valid Arrest Warrant?

Both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Nebraska hold steadfastly to the proposition that before a search of premises under a valid arrest warrant may be had the police must have probable cause to believe that the person to be arrested is on the premises at the time. (*Rice v. Wolff, Jr.*, Appendix 1, p. 51, Appendix 2, p. 81.) As the court well knows, Article IV of the United States Constitution is divided into two clauses, the first relating to the right of the people to be secure against "unreasonable" searches and seizures and the second, that no warrants shall issue but upon probable cause.

We respectfully contend that the key word regulating searches and seizures is the word "unreasonable." We believe the lower courts have put undue stress in this case upon "probable cause" to believe the suspect is on the premises at the time of entry rather than upon whether or not the entry was "reasonable." The interests of the state and citizens of Omaha under the circumstances far outweighed the interests of the defendant. The Court of Appeals and the District Court both say *Warden v. Hayden,* 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 is not applicable because the officers in *Hayden* had probable cause to believe the suspect was on the premises. We say this court upheld an officer with no warrant opening the lid of a washing machine to look for weapons (the machine was too small to hide the suspect)

not because they had probable cause to believe the suspect was on the premises (although this goes to the reasonableness question), but because it was not unreasonable to open the lid of the washing machine under the circumstances. As this court there said:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape."

The same is true in the present case, except that in the present case the circumstances were even more exigent, the police had an arrest warrant and a search warrant, and the police opened the door of the premises rather than the door of the washing machine. Once they did so all of the evidence was in plain sight. The test of reasonableness has been met and a dogged adherence to a phrase that one must have "probable cause to believe the suspect is on the premises at the time" while it may be applicable to the second part of the Fourth Amendment concerning securing of a warrant or when time and danger are not factors, it should not be used to invalidate a "reasonable" entry, to exercise an arrest warrant which had already been secured upon "probable cause." The Court of Appeals and the lower court used against the Omaha police the fact that they delayed the entry to obtain a search warrant saying this shows there was not exigent circumstances. Such reasoning not only punishes the police for trying to comply with what they

conceived the law to be in obtaining a warrant when possible, but also overlooks the fact that the lights in the house were on, the television was playing and the police who remained to guard the premises could see inside the house that there were many other units of the Omaha police following leads and working on the case around the city in the hopes of prevent further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance as the opinions indicate.

4. May Additional Facts be Presented at the Suppression Hearing to Bolster and Validate the Original Affidavit For a Search Warrant?

In *Spinelli v. United States,* 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, this court cited *Draper v. United States,* 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, as an appropirate example of probable cause. It there said:

> "The detail provided by the informant in Draper v. United States, 358 U. S. 307 (1959), provides a suitable bench mark."

The court went on to point out that the government informant did not state the way in which he had obtained his information but he did describe with minute particularity the clothes that Draper would be wearing, the train he would arrive on and other details. And, that independent police work corroborated much more than one small detail that had been provided by the informant. Upon meeting the Denver train on the second morning specified by the informer the police saw a man whose dress corresponded precisely to the informant's description and since the report was of a sort which, in experience, may be

recognized as having been obtained in a reliable way, the court stated that probable cause had been established.

In the present case at the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit because of the extreme volume of police reports and pressure of time. At the hearing on the motion to suppress adequate supplementary evidence known to the police at the time of the affidavit was presented sufficient to establish its authenticity as in *Draper, supra.* Furthermore, *Whitely v. Warden,* 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 indicates that the facts may be supplied later to support the previously issued arrest warrant. Neither the United States Court of Appeals for the Eighth Circuit nor the United States District Court for the District of Nebraska would adopt this approach, holding to the view that sufficient information must be presented to the magistrate at the time the warrant issues. (See Appendix 1, p. 39 and Appendix 2, p. 68).

This court in *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, discussed the conflict or disagreement over the importance of requiring law enforcement officers to secure warrants pointing out that some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. But, that others have argued with equal force that a test of reasonableness, applied after the fact of the search or seizure when the police attempt to introduce the fruits in evidence affords ample safeguards for the rights in question so that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

In the present case two judges of the Supreme Court of Nebraska in a concurring opinion suggested that the affidavit for a search warrant should be validated by the evidence in possession of the police at the time of the search warrant but not included therein but which was later presented at the hearing for the motion to suppress. On February 6, 1975, the Supreme Court of Nebraska referred to this case *State v. Dussault,* 193 Neb. 122, — N. W. 2d — holding in a unanimous opinion as follows:

> "We discussed what we believe to be the import of Aguilar and Spinelli in State v. Rice, *supra,* and will not repeat it here. Moreover, we indicated in that case that the contents of the affidavit may, at a suppression hearing, be supplemented by other evidence known to the police and if in toto probable cause may be said to have existed at the time of the search, the motion to suppress shall be denied. We there cited Draper v. United States, *supra,* and Whiteley v. Warden, *supra,* as supporting the position we there took. We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit. See State v. Rice, *supra,* at p. 755, opinion of McCown, J., concurring in result. Such a principle we deem proper in view of the fact that the United States Supreme Court has not resolved the controversy as to whether the police must always get

a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient to protect constitutional rights. * * * " (193 Neb. at 127).

This problem deserves the further attention of this court.

5. **After the Federal District Court Ruled the Search Warrant Was Invalid Should Not it Have Sent the Case Back to the State District Court for an Evidentiary Hearing on the Question of Entry and Search Without a Warrant for Exhaustion of That Issue?**

Since both the state trial court and the state Supreme Court found that the search warrant was valid it had no occasion to ever go into the facts or the law as to whether the entry and search would have been valid without the warrant. This was never even presented to the state district court. While it was briefed and argued to the state Supreme Court it cannot be assumed that the state Supreme Court seriously considered the question since it was unnecessary to its finding.

Of more importance, had the federal district court sent the case back to the state trial court in Douglas County, Nebraska, the Douglas County Attorney and his staff who tried the case originally and who with the police department were much more familiar with the case than the Attorney General's Office, could undoubtedly have developed the facts more thoroughly and convincingly than was done in the federal district court.

The stand of the United States Court of Appeals for the Eighth Circuit (Appendix 1, p. 46) here seems to be in

direct conflict with the stand of the same court in *Goham v. Wolff*, 471 F. 2d 52, where the Supreme Court of Nebraska had determined that the retrocession of federal jurisdiction over Indian lands was invalid but made no determination as to pending cases even though the matter was briefed and argued to the state Supreme Court. When the case reached the United States District Court for the District of Nebraska the district court found the retrocession to be valid and remanded the case to the state Supreme Court for exhaustion of the state remedy as to pending cases. The state Supreme Court refused to act upon the matter and upon appeal to the United States Court of Appeals, it affirmed the United States District Court that there had been no exhaustion. We see no distinction from the present case and, in fact, in the present case there is much more need for exhaustion than in the *Goham* case.

Respectfully submitted,

PAUL L. DOUGLAS,
Attorney General of Nebraska,

MELVIN KENT KAMMERLOHR,
Assistant Attorney General,

State of Nebraska,
2119 State Capitol
Lincoln, Nebraska 68509
Telephone: (402) 471-2211

Attorneys for Petitioner.

APPENDIX I

United States Court of Appeals
For the Eighth Circuit

No. 74-1682

David L. Rice,
Appellee,

v.

Charles L. Wolff, Jr., Warden,
Nebraska Penal and Correctional Complex,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

Submitted: December 12, 1974

Filed: January 28, 1975

Before MATTHES, Senior Circuit Judge, BRIGHT and STEPHENSON, Circuit Judges.

MATTHES, Senior Circuit Judge.

The petitioner in this habeas corpus action, David L. Rice, was convicted in Nebraska state court of the first degree murder of an Omaha policeman, Larry D.

Minard, who was killed when a suitcase he was examining exploded. The conviction was affirmed. *State v. Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972). Petitioner sought habeas corpus relief from the United States District Court for the District of Nebraska, pursuant to 28 U.S.C. § 2254. Chief Judge Urbom, after due consideration, granted the writ.

This appeal by the State of Nebraska for respondent Wolff raises several important questions in the law of search and seizure. At issue is whether Judge Urbom erred in ruling that the search of petitioner's house by members of the Omaha police force was illegal, and that certain evidence seized during that search or as a fruit of the search should have been suppressed at petitioner's trial in state court.

We first review the basic facts precipitating the prosecution and the ensuing court proceedings.

At 2:05 a. m. on Monday, August 17, 1970, an Omaha police radio dispatcher received a telephone call from a 911 operator that someone had reported a woman screaming at 2865 Ohio Street, in Omaha. The dispatcher sent two police cars to that address, and officers in a third vehicle also arrived at the scene. One of the policemen responding was Larry Minard. The house at 2865 Ohio was vacant. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Several minutes after the police first entered the house, Officer Minard approached the suitcase and apparently was inspecting it when it exploded, instantly killing him. Subsequent investigation established that the suitcase had contained dynamite, which had been wired in such a manner that any movement of the suitcase would detonate the dynamite.

A police task force immediately began an investigation of the bombing. By Saturday morning, August 22, 1970, the investigation began to focus upon one Duane

Peak, a fifteen-year-old member of the National Committee to Combat Fascism (NCCF), a political organization known in the community as the Black Panther Party. Specifically, several persons had identified Peak as the individual who had called to report a disturbance at the vacant house on Ohio Street. Moreover, several people had seen Peak some time prior to the murder of Officer Minard with a suitcase similar to the one used in the bombing. The police also had knowledge that Edward Poindexter, an officer in the NCCF, was capable of rigging a booby trap bomb.

The NCCF was well known to the Omaha police. For two years prior to the murder of Minard, the police had maintained an intelligence file on the NCCF and a predecessor organization, the United Front Against Fascism. The file included publications of the NCCF, some of which contained articles by Poindexter or petitioner advocating violence against the police and others.

On Saturday afternoon, August 22, warrants were issued for the arrest of Peak and Poindexter, and the Omaha police force began a city-wide search for the two suspects. Since the police had no specific information or tips as to the whereabouts of Peak or Poindexter, police officials listed the various places where it was believed the two might be located and instructed police teams to visit or search the various locations. Among the places searched or visited on Saturday afternoon and evening were the NCCF headquarters at 3508 North 24th Street, the residence of one of the suspects, and the homes of certain of their relatives and associates.

By Saturday evening Edward Poindexter had been apprehended. Peak, however, the prime suspect in the case, was still at large. The police believed that members of the NCCF were searching for Peak in order to eliminate him, since he supposedly could incriminate others in the NCCF as accomplices in the bombing. Consequently, the police search for Peak continued.

At 10:30 Saturday night policemen in search of Peak arrived at the home of David Rice, the petitioner, at 2816 Parker Street. Petitioner was known to the police as an officer in the NCCF. Based on testimony credited by Judge Urbom at an evidentiary hearing in the district court, it appears that the only reasons for placing petitioner's house on the list of places to be searched were that both petitioner and Peak were members of the NCCF and Peak had been in petitioner's house some weeks previously.

Lights and a television were on in the petitioner's home when the police arrived, but there was no response to the officers' knock at the door. The leaders of the police team, Sergeants Swanson and Pfeffer, decided not to forcibly enter the house immediately. Instead, they proceeded to the office of a Municipal Court Judge, made an affidavit, and obtained a search warrant while the other officers encircled petitioner's house and waited. Swanson and Pfeffer returned an hour or more later with the search warrant, and petitioner's house was finally entered by the police with the two-fold purpose of searching for and arresting Peak and searching for dynamite believed in the possession of the NCCF.

Peak was not in the house. But the police discovered, assertedly in plain view, fourteen sticks of dynamite, blasting caps, wiring, a battery, and a pair of long-nosed pliers.

Peak was subsequently arrested, and on August 27 petitioner voluntarily surrendered. The clothing petitioner was wearing at the time of his arrest was seized by the police and subjected to chemical analysis for dynamite particles.

Poindexter and petitioner subsequently were tried jointly for first degree murder. Both moved the state trial court to suppress various items seized by the police, including those seized during the search of petitioner's

house and the clothing seized from petitioner upon his arrest.[1] The state trial court denied the motion to suppress, ruling that the search was legal pursuant to a valid search warrant.

At the trial, Peak implicated Poindexter and petitioner in the bombing plot. As corroborative evidence, the State introduced many of the items seized at the petitioner's house during the search of August 22, and introduced the results of the chemical analysis of petitioner's clothing seized at the time of his arrest. The analysis indicated that dynamite granules were in the pockets of the trousers. Both defendants were convicted by a jury on April 17, 1971. Petitioner was sentenced to life imprisonment.

On appeal to the Supreme Court of Nebraska, the primary attack by Poindexter and petitioner was upon the trial court decision to deny the motion to suppress. Specifically, they contended that the trial court erred in upholding the validity of the search warrant. The State defended the ruling of the district court, but further argued that even if the search warrant was improper, entry into petitioner's house was reasonably and properly undertaken in search of Duane Peak, and the evidence discovered in plain view during this search pursuant to a valid arrest warrant was admissible at trial. The two defendants attacked this alternative ground of search to arrest in their reply brief.

---

1. Petitioner contended in both the state courts and in the federal district court that the search of his clothing was based solely upon information obtained from the alleged illegal search of his house, and that the results of the chemical analysis of the clothing were therefore fruit of the poisonous tree. See Wong Sun v. United States, 371 U. S. 471 (1963). The district court so held, and the State has not attacked that ruling on appeal.

The state supreme court affirmed the convictions of both men on July 18, 1972, ruling that the search of petitioner's home was pursuant to a valid search warrant. The court did not consider whether entry into petitioner's home could be justified as one in search of Peak. *See State v. Rice, supra.*

On September 29, 1972, petitioner filed this petition for writ of habeas corpus in the federal district court in Nebraska. Petitioner urged that his sentence was unlawful because the underlying conviction was based upon evidence seized in violation of the fourth and fourteenth amendments to the United States Constitution.

Judge Urbom filed a memorandum on March 30, 1974, — F. Supp. — (D. Neb. 1974), ruling that the affidavit for the search warrant was fatally defective and that consequently the search warrant was invalid. The district court ordered a hearing on the alternative ground asserted by the State as legally justifying the entry and search of the residence. An evidentiary hearing was held, and on July 5, 1974, Chief Judge Urbom filed an opinion, — F. Supp. — (D. Neb. 1974), finding that the police did not have probable or reasonable cause to enter the petitioner's house in search of Peak, and that the search was therefore wholly unlawful. Habeas corpus relief was granted: petitioner was ordered released from custody unless he was granted a new trial within 90 days of the district court decision or within 90 days of an appellate court decision affirming the district court order, whichever was later. This appeal by the State of Nebraska for respondent Wolff followed.

I.

We turn first to the ruling of the district court that the warrant to search the petitioner's house was invalid. It is fundamental constitutional law, of course, that a search warrant may issue only upon a showing that there is probable cause to believe that the item sought is lo-

cated on the premises for which the search warrant is requested. *United States v. United States District Court,* 407 U. S. 297, 316-317 (1972); *Aguilar v. Texas,* 378 U. S. 108, 112 (1964); *Nathanson v. United States,* 290 U. S. 41, 47 (1933). The district court found that the warrant in the instant case was invalid because the affidavit submitted by the two police sergeants to the magistrate was insufficient to establish probable cause.[2] *Spinelli v. United States,* 393 U. S. 410 (1969); *Aguilar v. Texas, supra.*

---

2. The affidavit submitted to the magistrate was as follows:

The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.

That said property is under the control or custody of David Lewis RICE, Minister of Information, National Comittee [sic] to Combat Fascism.

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Comitte [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the NCCF. We have been told in

(Continued on next page)

The state trial court on the motion to suppress and the state supreme court on appeal had ruled that the search warrant was supported by probable cause and therefore valid. In considering that probable cause had been shown, the state courts did not limit themselves to an examination of the affidavit before the magistrate. Rather, the state courts relied, in part at least, upon testimony adduced at the suppression hearing. Evidence at that hearing arguably showed that the police had probable cause to search petitioner's home, although the circumstances permitting the police to reach such a conclusion were for the most part not revealed to the magistrate at the time the search warrant was issued.

A.

The State contends that the federal district court should not have limited itself to an examination of only the affidavit of Pfeffer and Swanson in determining if the search warrant was supported by an adequate showing of probable cause. But the refusal of Judge Urbom to consider any facts or circumstances not revealed to the magistrate is amply supported by the opinions of the United States Supreme Court. *Spinelli v. United States,*

(Continued from previous page)

the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

Apparently, the only evidence of probable cause submitted to the magistrate was the officers' affidavit. The State does not contend that the affidavit was supplemented by any oral testimony of the officers before the magistrate.

supra, 393 U. S. at 413 n. 3; *Aguilar v. Texas, supra*, 378 U. S. at 109 n. 1. *See also Whitely v. Warden*, 401 U. S. 560, 565 n. 8 (1971).

By urging that the district court should have allowed the State at a suppression hearing subsequent to the search to rehabilitate the assertedly inadequate affidavit for the search warrant, the State is in effect suggesting that even in the absence of exigent circumstances the police should be permitted to conduct searches on their own assessment of probable cause, subject to the post hoc ratification of that assessment by the judiciary.[3] *Cf. United States v. Chavez*, 482 F. 2d 1268, 1270 (5th Cir. 1973). Such a procedure would be contrary to the previous teachings of the Supreme Court as to the policies to be furthered by the warrant requirement of the fourth amendment, and in no way would protect innocent citizens from unreasonable searches by police officers who had erred in assessing the existence of probable cause to search a particular premises. As Mr. Justice Jackson observed in *Johnson v. United States*, 333 U. S. 10, 13-14 (1948):

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a

3. Since we are here considering the search warrant in fact obtained by the police, we need not consider at this time those cases permitting law enforcement officials to act upon their own assessment of probable cause if exigent circumstances preclude the opportunity to seek a timely search warrant.

> search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.

Also, *see Chimel v. California*, 395 U. S. 752, 760-762 (1969).

Nevertheless, the State cites two Supreme Court opinions, *Draper v. United States*, 358 U. S. 307 (1959), and *Whitely v. Warden*, 401 U. S. 560 (1971), for the proposition that a showing before the magistrate of probable cause to search can be supplemented by information or circumstances known to the police officers but not disclosed to the magistrate issuing the warrant. The two decisions, however, do not stand for this principle.

There was no warrant of any kind involved in *Draper*. Rather, law officers arrested a heroin trafficker on a tip that he would be carrying heroin. Essential to an understanding of the *Draper* case is the realization that in certain instances a law enforcement officer may arrest without an arrest warrant if he, rather than a magistrate, has probable cause to believe that a crime is being committed. The Supreme Court in *Draper* held that a valid warrantless arrest of a suspect had been made because a post-arrest hearing showed that so much of the informer's tip had been verified by police observation that it was reasonable for the police to conclude that the informant's information that the suspect was carrying heroin was reliable, thereby establishing probable cause for arrest. Although *Draper* is valuable for providing a test on how much of the detail of an unsubstantiated informer's tip must be verified by police before the tip can be considered reliable grounds supporting a

finding of probable cause, *see Spinelli v. United States, supra,* 393 U. S. at 416-417; *United States v. Marihart,* 472 F. 2d 809, 812-814 (8th Cir. 1972), *Draper* does not render support to the proposition that a probable cause affidavit for a search warrant can be rehabilitated after the fact.

In *Whitely,* a Wyoming sheriff had obtained an arrest warrant from a magistrate, but upon an affidavit which did not adequately show that there was probable cause to arrest the suspects named. The Supreme Court specifically held, 401 U. S. at 565 n. 8, that the affidavit could not be rehabilitated in a post-arrest hearing by information known to the sheriff but not disclosed to the magistrate. The Court further held that the arresting officers did not have probable cause to make a warrantless arrest.

Neither case undermines the principles that a search warrant is valid only if probable cause has been shown to the magistrate and that an inadequate showing may not be rescued by post-search testimony on information known to the searching officers at the time of the search.

The State points out that the police officers in this case at least attempted to obtain a search warrant, and contends that the district court's refusal to judge probable cause on anything other than information revealed to the magistrate "penalizes" those officers who attempted to comply with the warrant requirement and "rewards" those who do not. Such an argument misapprehends the requirements and policies of the fourth amendment. For the reasons outlined above in the statement by Mr. Justice Jackson, the fourth amendment mandates that except in limited instances the police must submit the question of whether there is probable cause to search to the judgment of a neutral and detached magistrate. *Coolidge v. New Hampshire,* 403 U. S. 443 (1971); *Chambers v. Maroney,* 399 U. S. 42 (1970); *United States v. Bozada,* 473 F. 2d 389, 390-391 (8th Cir.),

cert. denied, 411 U. S. 969 (1973). "Only in exigent circumstances will the judgment of the police as to probable cause serve as sufficient authorization for a search." *Chambers v. Maroney, supra,* 399 U. S. at 51. Thus the requirement that probable cause be shown to the magistrate is not intended as "punishment," but rather is intended to protect basic fourth amendment rights of citizens. Likewise, a law enforcement officer who fails to seek a search warrant is not being "rewarded": unless he can point to exigent circumstances precluding the opportunity to apply for a warrant, he is required to have the presence of probable cause to search determined by a magistrate, and the failure to do so for the sole purpose of avoiding a review of probable cause will result in the search being held illegal.

Therefore, we hold that the district court did not err in reviewing the sufficiency of the showing of probable cause to issue the search warrant solely in light of the affidavit of probable cause submitted to the Municipal Court judge acting as magistrate.

B.

We now consider the ruling of the district court that the affidavit, viewed alone, did not make an adequate showing of probable cause to justify issuance of the search warrant. A study of the affidavit reveals that the officers' averment of probable cause to search was primarily based upon an informant's tip. Specifically, the only averment in the affidavit of criminal activity or of evidence of criminal activity in petitioner's house was the statement:

> We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

In *Aguilar v. Texas,* 378 U. S. 108 (1964), the Supreme Court specified what information is necessary to show probable cause in an affidavit relying upon an informant's tip. First, there must be evidence allowing the magistrate to conclude that the informant is himself trustworthy. Second, there must be a sufficient showing of the underlying circumstances on which the informant based his information to enable the magistrate to determine that the informant's tip is reliable and not based on mere rumor. In *Spinelli v. United States,* 393 U. S. 410 (1969), the Supreme Court further refined *Aguilar* by holding that an affidavit deficient under the *Aguilar* test is nevertheless sufficient if averments in the affidavit, aside from the tip, so corroborate the tip that it is "as reliable as one which passes *Aguilar's* requirements when standing alone." 393 U. S. at 416. *See United States v. Cummings,* — F. 2d — (8th Cir. 1974); *United States v. Marihart, supra,* 472 F. 2d at 813.

It is apparent that the affidavit filed by Sergeants Pfeffer and Swanson in this case does not meet either criterion of the *Aguilar-Spinelli* test[4] The affidavit contains no averments from which the magistrate could conclude that the informant was reliable and trustworthy. Nor could the magistrate determine from the affidavit that the informant's tip was based upon more than mere rumor and speculation. The averments of the affidavit that petitioner was a member of the NCCF and that NCCF members had already been arrested in the case possibly enhanced the suspicion that petitioner in some way was involved with the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in the petitioner's house.

---

4. Indeed, the state trial court found that the affidavit, if not rehabilitated by evidence not disclosed to the magistrate, failed to comply with the requirements of Aguilar and Spinelli.

The Supreme Court stated in *Spinelli v. United States, supra,* 393 U. S. at 416:

> In the absence of a statement detailing the manner in which the information was gathered, it is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation.

The principal shortcoming in the affidavit presently under review is that the only corroboration of the informant's tip is the petitioner's reputation as a member of the NCCF, precisely the type of vague and nebulous corroboration condemned in the above passage from the *Spinelli* opinion.

The State, however, directs our attention to *United States v. Harris,* 403 U. S. 573 (1971), in which a plurality of the Supreme Court indicated that it was willing to relax the standards for judging the reliability of informants' tips. The State suggests that this court should do likewise. But *Aguilar* and *Spinelli* have not been overruled, and this court previously has stated subsequent to *Harris* that it will continue to apply the standards of *Aguilar* and *Spinelli* in the absence of a more definitive ruling by the Supreme Court. *United States v. Marihart, supra,* 472 F. 2d at 813 n. 5; *LeDent v. Wolff,* 460 F. 2d 1001, 1003 (8th Cir. 1972).[5]

---

5. Even if the Harris reasoning were applied to the present affidavit, it is apparent that the affidavit would still be deficient. In Harris, the affidavit at least met one half of the Aguilar test, since it averred that the informant's tip was derived from per-

(Continued on next page)

The decisions of the Supreme Court convincingly demonstrate, and we so hold, that the district court was left with no choice but to conclude that the affidavit of Sergeants Pfeffer and Swanson was insufficient to establish probably cause. Consequently, the district court was correct in holding that the search warrant was invalid.

II.

The State urges that even if the federal district court was correct in ruling that the search warrant was invalid, the court erred in holding that the police officers could not legally enter the petitioner's house in search of Duane Peak, for whom the police had a valid arrest warrant. If the police could legally enter the house in search of

---

(Continued from previous page)

sonal observation and therefore was based upon reliable information.

The significance of the **Harris** opinion is that it upheld the affidavit even though the trustworthiness of the informant was not shown. But the **Harris** affidavit contained additional indicia that the informant was reliable: the informant was making an admission against penal interest; the tip was highly detailed, further suggesting personal observation; and the conduct attributed by the informant to the property owner was consistent with the owner's criminal reputation. The affidavit in our case contains no such corroboration suggesting the informant's trustworthiness or the reliability of his information. Petitioner's reputation as a member of the NCCF is insufficient in itself to substantiate a tip that his house contained explosives. **See generally 85 Harv. L. Rev. 3, 53 (1971).**

Peak, then it is likely that the seizure of the dynamite and related paraphernalia was proper, since it appears from the record that the incriminating evidence probably was in plain view inside the house.

A.

As a preliminary matter, the State contends that the federal district court should not have considered the question whether the police could legally enter petitioner's home in search of Peak. Instead, the State argues, Judge Urbom should have dismissed the petition on the ground that the petitioner had not exhausted his state remedies for relief on this alternative ground, since no Nebraska state court has ever ruled on the specific question of whether the police could enter petitioner's house in search of Peak. The State thus submits that the state courts should be allow to rule on this question before a federal district court construes it. Judge Urbom rejected this suggestion. We find that he was correct in doing so.

It is, of course, settled law that federal habeas corpus will not be granted to a state prisoner unless he has exhausted all available state remedies. 28 U. S. C. §§2254 (b) & (c). This doctrine of exhaustion of state remedies is a rule designed to harmonize the relationship between the federal judiciary and the state court systems, for "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation." *Darr v. Burford,* 339 U.S. 200, 204 (1950).

But there are limits to the scope of the exhaustion doctrine, and the exhaustion standard is not an inflexible requirement: it is a rule of comity and not a rule limiting the power of the federal courts to give habeas relief. *Smith v. Wolff,* — F. 2d — (8th Cir. 1974). Thus the Supreme Court has held that the exhaustion provisions of § 2254 refer only to those remedies still open to the habeas petitioner at the time he files his petition in the

federal district court. *Humphrey v. Cady,* 405 U. S. 504, 516 (1972); *Fay v. Noia,* 372 U. S. 391, 434-435 (1963). Similarly, it is not necessary that the state courts must have ruled on the merits of an issue before the question can be considered by the federal judiciary in a habeas action. *United States ex rel. Meadows v. State,* 426 F. 2d 1176 (2d Cir. 1970), *cert. denied,* 401 U. S. 941 (1971); *Loiseau v. Sigler,* 421 F. 2d 825 (8th Cir. 1970). It is enough that the state courts have been presented the opportunity to rule on the questions raised by the petitioner in his federal petition. *Picard v. Conner,* 404 U. S. 270 (1971).

There is no question that the petitioner in this case presented to both the state trial court and the state supreme court his claim that the search of his house was illegal. Specifically, he asserted that the search warrant on which the search was based was deficient. Obviously, petitioner was not required to anticipate all the possible defenses the State might assert to his claim that the search of his house was illegal. In fact, the State did not pose the alternative ground of a search to arrest Peak at the suppression hearing, but rather first asserted that possible justification for the search during petitioner's appeal to the Supreme Court of Nebraska.[6] Nevertheless, the Supreme Court of Nebraska declined the opportunity to consider this alternative ground, and declined also to order further factfinding on the matter. Instead, the court ruled that the search warrant was valid.

---

6. Indeed, the State used one-third of its 54-page brief in the state supreme court to recite parts of the voluminous trial record from which the State believed the court could rule that entry into petitioner's house was legal as a search for Peak, even if the search warrant was defective.

Moreover, it is clear that on the facts of this case petitioner had no effective remedy still available in the state courts when he filed his federal habeas petition. The state supreme court had already ruled on direct appeal that the search warrant was valid. Any attempt by petitioner to seek post-conviction relief in the state courts surely would have been rejected on the ground that, regardless of whether the police legally could have entered petitioner's house to search for Peak, the state supreme court had rendered consideration of the issue unnecessary by holding that the search warrant was valid. Clerly, any attempt by petitioner to further attack the search of his house as illegal in any state post-conviction proceeding would have been an exercise in futility. *See Wilwording v. Swenson,* 404 U. S. 249 (1971); *United States ex rel. Condon v. Erickson,* 459 F. 2d 663 (8th Cir. 1972). *Cf. Evans v. Cunningham,* 335 F. 2d 491 (4th Cir. 1964). The intervening circumstance of the search warrant being held invalid, thereby creating the possibility of a new avenue for relief in the state courts, occurred only after the filing of petitioner's federal habeas petition — as a direct consequence of that filing.

We consider *Roberts v. LaVallee,* 389 U. S. 40 (1967), to be analogous authority for the propostion that the petitioner need not seek further relief in the state courts before applying for federal relief. In *Roberts,* a New York criminal defendant sought from the state trial court a free transcript of a prior preliminary hearing. The request was denied and the defendant was eventually convicted. On the subsequent appeal the propriety of the denial of the free transcript was raised, but the defendant's conviction was affirmed. The defendant then sought federal habeas relief. After his federal petition was denied by the district court, a state appellate court decision in an unrelated case ruled that the denial of a free transcript of a preliminary hearing was a denial of equal protection under both the federal and state constitutions. The Court of Appeals for the Second Circuit declined to rule on the defendant's appeal from the denial

of federal habeas relief because the "constitutional necessity for federal court intervention" was "open to doubt'" in light of the recent state appellate court decision and the likelihood of relief in the state court if the defendant filed a state post-conviction motion. The United States Supreme Court reversed, noting that Congress in enacting the exhaustion requirement of 28 U.S.C. § 2254 had "not intended to require repetitious applications to the state courts."

We believe that the *Roberts* opinion supports our holding that petitioner has exhausted his state remedies and need not return to the state courts to further litigate the legality of this alternative ground arguably justifying the search, a ground which was raised before the state supreme court but which the court declined to consider or inquire into.

Our holding in *Goham v. Wolff*, 471 F. 2d 52 (8th Cir. 1972), *cert. denied sub nom. Tyndall v. Wolff*, 414 U. S. 834 (1973), is not to the contrary. In *Goham*, unlike in *Roberts* and the present case, the intervening circumstances creating the renewed possibility of obtaining relief in the state courts occurred before the prisoner filed his petition for federal habeas corpus relief. Thus the petitioner in *Goham* could have sought relief just as easily and effectively in the state courts as in the federal judiciary. In our case, however, the petitioner had no effective state remedy available when he filed his federal petition. Moreover, to send the petitioner back to the state courts, over two years after the filing of his federal habeas motion, to assert a question which the state supreme court previously had before it, is manifestly unreasonable, and we do not believe that the law requires such a result. In any event, the holding in *Goham* probably has been weakened by a subsequent decision of the United States Supreme Court reaffirming the teachings of *Roberts v. LaVallee. Francisco v. Gathright*, — U.S. — (1974). As we noted in *Loiseau v. Sigler, supra*, 421 F. 2d at 828:

> The doctrine of exhaustion of state remedies is only a rule of comity and need not be mechanically applied where the state court, for procedural reasons, has once refused to pass upon the merits of the question. In any event, once jurisdiction is asserted and the federal district court has conducted a full evidentiary hearing, it would be a waste of judicial machinery to require a second evidentiary hearing by another court which exerts only concurrent jurisdiction.

We hold that the petitioner has exhausted his state remedies, and that the district court did not err in considering petitioner's claim that the entry by police into his home to search for Duane Peak was illegal. *See, e.g., Roberts v. LaVallee, supra; Francisco v. Gathright supra; Loiseau v. Sigler, supra; Smith v. Peyton,* 413 F. 2d 760 (4th Cir. 1969); *Hawkins v. Robinson,* 367 F. Supp. 1025 (D. Conn. 1973). *Cf. United States ex rel. Condon v. Erickson,* 459 F. 2d 663 (8th Cir. 1972).

B.

Finally, we reach the argument to which the State devotes most of its brief in this court: even if the search warrant for the petitioner's house was invalid, police officers legally could enter the house in search of Peak in order to arrest him.

Police entry into a private dwelling without a search warrant in search of a suspect for whom an arrest warrant has been issued carries precisely the same fourth amendment implications as entry into a dwelling to make a warrantless search for tangible property. Citizens are entitled to the same constitutional protection from unreasonable searches and seizures when the police are seeking a suspect for arrest as when they are seeking some contraband for evidence. Thus, "arrest warrants are not substitutes for search, warrants." *Government of the Virgin Islands v. Gereau,* 502 F. 2d 914, 928 (3rd Cir. 1974).

Consequently, we hold, as have several other courts of appeals, that the fourth amendment mandates, as a minimum, that police officers may not enter the dwelling or premises of a third person in search of a suspect for whom they have a valid arrest warrant unless they have reasonable or probable cause to believe that the suspect is within.[7] *Government of the Virgin Islands v. Gereau, supra; United States v. Phillips,* 497 F. 2d 1131 (9th Cir. 1974); *Fisher v. Volz,* 496 F. 2d 333 (3rd Cir. 1974); *United States v. Brown,* 467 F. 2d 419 (D. C. Cir. 1972); *United States v. McKinney,* 379 F. 2d 259 (6th Cir. 1967). *Cf. Lankford v. Gelston,* 364 F. 2d 197 (4th Cir. 1966). *See also United States v. Shye,* 492 F. 2d 886 (6th Cir. 1974) (opinion of district court as appendix); *United States v. Watson,* 307 F. Supp. 173 (D. D. C. 1969). To hold otherwise would carve out an exception to the constitutional requirement that citizens are to be secure from unreasonable searches and seizures, for the Supreme Court noted in *Chambers v. Maroney, supra,* 399 U.S. at 51:

> In enforcing the Fourth Amendment's prohibition against unreasonable searches and seizures, the Court has insisted upon probable cause as a minimum requirement for a reasonable search permitted by the Constitution.

---

7. Given the factual setting of the cases before us, we need not consider whether the police officers should have obtained a valid search warrant before entering petitioner's home in search of Peak. It is not yet settled whether the Constitution requires not only that the policeman have probable cause to believe that the suspect sought for arrest is within the premises but also that, absent exigent circumstances, he obtain a search warrant. **Compare United States v. McKinney,** 379 F. 2d 259, 262-263 (6th Cir. 1967), **with United States v. Shye,** 492 F. 2d 886, 891 (6th Cir. 1974). **See generally** Amsterdam, **Perspectives on the Fourth Amendment,** 58 **Minn. L. Rev.** 349, 360 (1974); Note, **The Neglected Fourth Amendment Problem in Arrest Entries,** 23 **Stanford L. Rev.** 995 (1971).

The State insists that the police officers did indeed have probable cause to believe that Peak was inside when they entered petitioner's house on August 22. After an evidentiary hearing on this question, Judge Urbom found that the police did not have such probable cause. We agree.

In an effort to show that the police had probable cause to believe that Peak was in the house, the State refers to numerous places in the substantial record where it was shown that the police knew at the time of the search that Peak, Poindexter, and petitioner were members of the NCCF; that petitioner and Poindexter could fabricate a bomb; and that Peak probably had a role in the bombing. But none of this evidence, or at least none credited by Judge Urbom, shows that the police had a firm, concrete, and otherwise reasonable belief that Peak was at the petitioner's house when they entered it. It is one thing to know that Peak is a member of the NCCF suspected of helping lure a policeman to his death and quite another to know that Peak is at the petitioner's house or even that petitioner may have explosives stored in his home.[8]

In fact, the tesitmony of the various police officers at the evidentiary hearing held before the district court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that they were acting on nothing more than a hunch or random guess. The statements of Sergeants Pfeffer and Swanson, the leaders of the search, as well as one of their superiors, Lieutenant Perry, show that the Omaha police had made a list of the locations where Peak might be found,

---

8. Indeed, at the time of the search of petitioner's home, the police apparently had no evidence or tips specifically tying petitioner to the bombing plot.

based on his prior habits and associations. The petitioner's house, as well as the homes of other friends and relatives of Peak and Poindexter, were to be searched in accordance with this list. Thus, for example, Sgt. Swanson testified:

> Q. Did you have any report from ayone that Duane Peak was then side the Rice house or had been inside the Rice house that day?
>
> A. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be.

Clearly, such speculation is not a reasonable ground justifying the invasion of citizens' privacy.

The State, however, points to certain testimony given by Lt. Perry at the federal district court hearing which suggests that he had been told by relatives of Duane Peak that Peak was a constant companion of petitioner and Poindexter and that the bomb which killed officer Minard was made at petitioner's house. The State urges that the district court should have found that the police had probable cause to enter petitioner's house based on this testimony. But Judge Urbom discredited this testimony after finding that it was uncorroborated and indeed contradicted by the rest of the record. ——F. Supp. at ——. We have stated before in reviewing factual determinations of a district court hearing a habeas petition that this court "will not retry issues of fact or substitute its judgment with respect to such issues for the judgment of trial court." *Schultz v. State of Nebraska,* 353 F. 2d 81 (8th Cir. 1965). "It was the province of the District Court to make credibility determinations." *Stidham v. Wingo,* 482 F. 2d 817, 820 (6th Cir. 1973); *King v. Beto,* 429 F. 2d 221 (5th Cir. 1970), *cert. denied,* 401 U. S. 936 (1971). After reviewing the record, we find that Judge Urbom's decision to discredit this particular testimony

was amply supported by the record and was not clearly erroneous.[9]

The State cites the Supreme Court opinion in *Warden v. Hayden,* 387 U. S. 294 (1967), and urges that police entry into a dwelling in search of a suspect, without probable cause to believe that he is within, may be constitutionally reasonable if certain exigent circumstances exist. But in *Hayden* the police in fact had probable cause to believe that the suspect was within the dwelling searched, and the *Hayden* opinion does not suggest that exigent circumstances may eliminate the need for police to have probable cause to believe the suspect is inside the premises to be searched.[10]

---

9. We are constrained to observe that even if the district court had credited the particular testimony of Lt. Perry in question, it is still doubtful that the police had probable cause to enter the house in search of Peak. **Cf. United States v. Shye, supra,** 492 F. 2d at 890 n. 4.

10. In **Hayden,** an armed robber was pursued by two taxi drivers who saw him enter a certain house. Within minutes the police arrived and entered the house pointed out to them by the two drivers. 387 U. S. at 297. The police cearly had every reason to believe the robbery suspect was still inside the house.

Dorman v. United States, 435 F. 2d 385 (D. C. Cir. 1970), and **Salvador v. United States,** — F. 2d — (8th Cir. 1974), are both distinguishable. In each case the court upheld the entry of a dwelling by law officers without a search warrant seeking a suspect under exigent circumstances, but each court explicitly found that the officers had probable cause to believe that the suspect was within. Nevertheless, there is language in **Dorman** intimating that, despite the absence of probable cause, entry into a dwelling in search of a suspect may be justified in certain instances by exigent circumstances. To the extent **that Dorman so holds, we respectfully disagreed.** Moreover, the very court which

(Continued on next page)

As we noted above by our reference to the Supreme Court opinion in *Chambers v. Maroney*, the minimum requirement for a reasonable search permitted by the Constitution is the existence of probable cause. *Hayden* and numerous other similar fourth amendment opinions of the Supreme Court stand for the principle that the additional constitutional requirement that the existence of this required probable cause be determined initially by a magistrate upon application for a search warrant need not be observed if certain exigent circumstances prevail which prevent the law officers from timely obtaining a search warrant. *See Fisher v. Volz, supra; United States v. Rubin*, 474 F. 2d 262, 268 (3rd Cir. 1973). *See also Camara v. Municipal Court*, 387 U. S. 523, 534-535 (1967).

The State, however, points to several state appellate court decisions relating to searches for explosives and bombs, and urges that in an exigent situation when the police are searching for a bombing suspect or bomb components, the degree of probable cause required to render a search reasonable is lessened or eliminated.[11] *See, e. g.,*

(Continued from previous page)

rendered the Dorman opinion has ruled without qualification subsequent to Dorman that police must have probable cause before entering the dwelling of a third party in search of a suspect. United States v. Brown, 467 S. 2d 419 (D. C. Cir. 1972). As we noted above, other courts of appeals have held likewise. See, e. g., Fisher v. Volz, supra; United States v. Phillips, supra.

11. In Camara v. Municipal Court, 387 U. S. 523 (1967), and See v. City of Seattle, 387 U. S. 541 (1967), the Supreme Court recognized that probable cause is the constitutional measure of the reasonableness of a search, but modified the degree of probable cause required to make an administrative search reasonable by focusing on the governmental interest sought to be furthered

(Continued on next page)

People Superior Court, 6 Cal. App. 3d 379, 85 Cal. Rptr. 803 (1970). We note, however, that none of the cases cited holds that the probable cause requirement of the fourth amendment may be obviated by the exigencies of searching for a bombing suspect or explosives. Moreover, in light of what we have said above, we have serious doubts that the State's argument is in harmony with the provisions of the Constitution. *See, e. g.*, notes 10 and 11, *supra*. But in any event we need not consider this contention of the State, for we find that the district court did not err in ruling that on the record of this case the State has not shown exigent circumstances which could justify this search, even under the State's own theory on the law of probable cause.

The argument by the State that the Omaha police did not have to meet as stringent a probable cause standard in searching for Peak or the explosives in petitioner's house is primarily based upon two asserted exigent circumstances: (1) that the police officers feared that explosives possibly stored in the house might explode; and (2) that the officers believed that other NCCF members might be in the process of eliminating Peak inside the house.

(Continued from previous page)

by that type of search: for example, a non-hostile search by health or fire officials to preserve the health and safety of all residents. There is nothing in either opinion to suggest that the degree of probable cause which must be shown to execute a criminal search ought to be modified in exigent circumstances. See generally Note, The Law of Administrative Inspections: Are Camara and See Still Alive and Well?, 1972 Wash. U. L. Q. 313.

Significant for the purposes of the appeal before us is the following language from Camara, supra, 387 U. S. at 534-535.

> In cases in which the Fourth Amendment requires that a warrant to search be obtained, "probable cause" is the

(Continued on next page)

The conduct of the police upon arrival at petitioner's home, however, erodes the exigent circumstances argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandates of the fourth amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose of searching for explosives was an after-thought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in the petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.

(Continued from previous page)

standard by which a particular decision to search is tested against the constitutional mandate of reasonableness. To apply this standard, it is obviously necessary first to focus upon the governmental interest which allegedly justifies official intrusion upon the constitutionally protected interest of the private citizen. For example, in a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that the goods might be found. Consequently, a search for these goods, even with a warrant, is "reasonable" only when there is "probable cause" to believe that they will be uncovered in a particular dwelling.

As for the apprehension that Peak was being killed, the delay of more than an hour before entering the house greatly attenuates the force of this argument.

We find that Judge Urbom did not err in ruling that there existed no exigent circumstances justifying the police search of petitioner's home without probable cause.

III.

We have read the brief of the amici to this court. The International Association of Chiefs of Police and Americans for Effective Law Enforcement, and we note their suggestion that we evaluate the application of the exclusionary rule in this case in light of the Supreme Court opinion in *Michigan v. Tucker,* 417 U. S. — (1974). But the Court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law. In *Tucker,* Mr. Justice Rehnquist, writing for the Court, observed:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in the particular investigating officers, or in their future counterparts, a greater degree of care toward the right of an accused.

417 U. S. at ——.

We consider it necessary to point out that the record discloses a widespread search for the suspects Peak and Poindexter which evinced at least a negligent disregard by the Omaha police for the constitutional rights of not only petitioner but possibly other citizens as well.[12]

---

12. In dictum in **United States v. Cecil,** 457 F. 2d 1178, 1180 (8th Cir. 1972), we disapproved of the manner in which the search of the NCCF headquarters was conducted by law enforcement officers earlier on Saturday, August 22, 1970.

Such a police search is at least reminscent of the police conduct condemned in *Lankford v. Gelston, supra.* We believe that this is an appropriate case for the application of the exclusionary rule.

In summary, we hold that the existence of probable cause to support a search warrant may be judged only on the information submitted to the magistrate issuing the warrant, and we further hold that the evidence of probable cause submitted to the magistrate in this case was wholly insufficient, thereby rendering the search warrant under review invalid. Furthermore, finding that the petitioner has exhausted his state post-conviction remedies, we hold that the warrantless police entry into petitioner's house in search of Duane Peak or any explosives was without probable cause and in violation of the United States Constitution.

In concluding this lengthy opinion, we are mindful that a brutal crime was perpetrated in which the life of a police officer was ended without justification. It cannot be gainsaid that Judge Urbom recognized the seriousness of the offense and the general public outrage over the crime. Against this background, Judge Urbom exercised painstaking care in resolving the factual and constitutional issues in this case. Having done so, Judge Urbom conscientiously and courageously concluded and demonstrated in two soundly reasoned opinions that the petitioner had been deprived of a basic constitutional right.

We suspect that our affirmance of the grant of the writ will be regarded by some as an example of permissiveness and lack of concern for society by the judiciary. But no matter how heinous the crime, the fact of its commission alone is insufficient under our system of jurisprudence to establish the guilt of the accused. The safeguarding of fundamental constitutional rights is a tolerable price to pay for cherished standards of justice.

As Judge Urbom noted in his opinion, — F. Supp. —:

> No one can doubt the important public interest involved in apprehending an accused murdered of a police officer, but I think respondent seriously mischaracterizes the interest involved in preventing invasions of privacy by the police. The privacy of one's home and the concommitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home.

The judgment of the district court is affirmed. Unless the State of Nebraska retries petitioner within a reasonable time, to be fixed by the district court, after the filing of our mandate in that court, the writ shall issue.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eights Circuit.

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

David L. Rice,

Petitioner,

v.

Charles L. Wolff, Jr., Warden, of the
Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM

(Filed March 30, 1974)
CV72-L-303

APPEARANCES: For petitioner, David L. Herzog and Patrick Green
For respondent, Melvin Kammerlohr, Assistant Attorney General

URBOM, Chief Judge

David L. Rice has filed a petition for writ of habeas corpus in which he seeks release from the Nebraska Penal and Correctional Complex on the ground that his incarceration is in violation of the Constitution of the United States. The petitioner has been incarcerated at the Penal

Complex since his conviction by a jury in the District Court of Douglas County, Nebraska, of the crime of first degree murder in the bombing death of Omaha police officer Larry D. Minard, Sr. The case has been submitted to this court on the state court record. After long and careful consideration, this case is ready for decision, at least in part.

A brief recitation of the facts surrounding the petitioner's conviction would be helpful. Early on the morning of August 17, 1970, the Omaha police department received an emergency telephone call purportedly originating from 2865 Ohio Street. The caller informed the emergency operator that a girl or woman was screaming for help from a vacant house next door at 2867 Ohio Street. Several patrol cars responded to this emergency call, including that of Officer Minard. Minard and several other officers entered the vacant house. In the course of entering, the officers noticed a suitcase lying on its side in the doorway. While the search was being conducted an explosion occurred which killed Minard. At the time of the explosion Officer Minard was standing near the suitcase and apparently inspecting it. Later investigation determined that the explosion was caused by dynamite contained in the suitcase which had been rigged as a booby trap. Intensive police investigation led to the conclusion that Duane Peak was a prime suspect in the case. Peak was a known member of the National Committee to Combat Fascism (NCCF). The investigation also revealed that Edward Poindexter, an officer of the NCCF, was capable of rigging a booby trap bomb. Warrants were issued for the arrest of both Peak and Poindexter. The Omaha police conducted a search of the headquarters of the NCCF pursuant to the arrest warrants. Neither Peak nor Poindexter was found at the headquarters, but Poindexter was arrested shortly after the conclusion of the search. Prior to the bombing death of Minard, the Omaha police had received a tip that dynamite might be stored at the home of the petitioner. The Omaha police did not act on that tip until after the search of the NCCF

headquarters. That same night two Omaha police officers obtained a search warrant for the petitioner's house at 2816 Parker Street.[1] Pursuant to this search warrant and the arrest warrant for Peak, a search of this house was conducted. This search discovered several items which were subsequently introduced into evidence at the petitioner's trial: blasting caps with wire (photograph substituted), dynamite wrapper (taken from dynamite found in the house), orange grip pliers, a battery, and some dynamite. The petitioner turned himself into the police after learning that there was an arrest warrant out for him. After his arrest the petitioner's clothing was removed from safekeeping in the Douglas County, Nebraska, jail and subjected to examination by the crime laboratory of the Alcohol, Tobacco and Firearms Division of the Treasury Department in Washington, D.C. This examination revealed dynamite particles in the pockets of the clothing. This evidence was also introduced at trial. Peak was subsequently arrested and testified at Rice's trial that the petitioner was involved in the murder. The petitioner was convicted as one of the instigators of the crime.

The petitioner alleges that he is being incarcerated in violation of the United States Constitution in the following respects:

1. His conviction rests upon evidence that was seized in violation of the Fourth Amendment's prohibition of unreasonable searches and seizures in that the search of 2816 Parker Street was conducted pursuant to a search warrant which was issued without probable cause due to an insufficient supporting affidavit;

2. The search of his clothing and seizure of dynamite particles found therein was based solely on the information obtained pursuant to the illegal search of 2816 Parker Street, and the particles, therefore, became fruit of the poisoned tree, and in any

event the clothing was searched without a warrant, which in and of itself would make the search illegal.

The respondent urges that even if the search warrant was issued without probable cause, nonetheless the search of the petitioner's premises was constitutionally permissible, because the evidence was discovered incident to a search for Duane Peak pursuant to a valid arrest warrant for Peak.

The petitioner has clearly exhausted available state court remedies, as required by 28 U.S.C. § 2254(b), regarding the validity of the search warrant. The Supreme Court of Nebraska in affirming the conviction held that the search warrant was issued with probable cause. *State v. Rice,* 188 Neb. 728 (1972). Thus this court may deal with this question on the merits.

I.

The record contains no evidence that any information outside the affidavit was presented to the magistrate. In part the Supreme Court of Nebraska rested its finding of validity in the search warrant upon information which the police officers had but which was not revealed to the magistrate. In my opinion, such consideration is not acceptable under federal constitutional standards. The fundamental purpose of a warrant is to place behind the force of the warrant a detached magistrate's objective evaluation of information. He cannot evaluate information not known to him and the propriety of his action should be determined from what he knew, not from what someone else knew or later came to know. An analysis of the validity of the search warrant must be made from the affidavit alone, because nothing else was considered by the magistrate.[2]

Neither *Whitely v. Warden, Wyoming State Penitentiary,* 401 U. S. 560 (1971), nor *Draper v. United States,* 358 U. S. 307 (1959), relied upon by the Supreme Court of Nebraska, supports a contrary view.

It must be kept in mind that testing the validity of a search *warrant* is different from testing the validity of a *search* in the absence either of any search warrant or of a valid search warrant. So, also, testing the validity of an *arrest warrant* is different from testing the validity of an *arrest* in the absence either of any arrest warrant or of a valid arrest warrant.

Draper involved an arrest in the absence of any arrest warrant; *Whitely* involved an arrest in the absence of a valid arrest warrant. In each, information not presented to a magistrate was permitted for testing the validity of the *arrest,* not for the purpose of testing the validity of a *warrant.* Consistently, in the present case knowledge of the searching officers beyond that presented to the magistrate may be considered in testing the validity of the search, if the search warrant is invalid, but may not be used in testing the validity of the search warrant. For the moment, then, consideration is limited to the affidavit, because the issue is the validity of the warrant.

Additionally, the tip is essential to the validity of the warrant. This follows, since this is a search warrant and therefore must contain reasons for believing that a particular item is to be found in a particular place. The only averment linking the petitioner's house with criminal activity is the averment in the tip that Rice keeps explosives at his residence. The mere allegations that David Rice is a known member of the NCCF which advocates violent killing of police officers, that David Rice is Minister of Information of the NCCF, that a violent killing of a police officer occurred recently in Omaha, and that arrests have been made from the membership of the NCCF, would not give a magistrate probable cause to issue a search warrant for explosives at David Rice's home. This would amount to issuance of a warrant upon the basis of reputation alone, and this is forbidden by *Nathanson v. United States,* 290 U. S. 41 (1933). See also, *United States v. Harris,* 403 U. S. 573, 582 (1971). Hence, this case may be analyzed in accordance with the

line of decisions wherein tips were essential to the validity of the search warrants.

Prior to *United States v. Harris,* supra, the obvious starting place for analysis was *Aguilar v. Texas,* 378 U. S. 108 (1964). In *Harris,* the plurality opinion of Chief Justice Burger de-emphasizes the significance of *Aguilar* and takes as its benchmark *Jones v. United States,* 362 U. S. 257 (1960). This part of the Chief Justice's opinion is joined in by only two other justices, however. Moreover, the Chief Justice's opinion makes it clear that *Aguilar* is not being overruled. 403 U. S. 573, 577. Additionally, the Eighth Circuit Court of Appeals views *Aguilar* as the proper starting point despite *Harris. LeDent v. Wolff,* 460 F. 2d 1001 (C. A. 8th Cir. 1972); *United States v. Marihart,* 472 F. 2d 809, 813 n. 5 (C. A. 8th Cir. 1972); *United States v. Smith,* 462 F. 2d 456 (C.A. 8th Cir. 1972). Accord, *United States v. McNally,* 473 F. 2d 934 (C. A. 3rd Cir. 1973); *United States v. Davenport,* 478 F. 2d 203 (C. A. 3rd Cir. 1973); *United States v. Black,* 476 F. 2d 267 (C. A. 5th Cir. 1973). Therefore, this court takes as its starting place for analysis the *Aguilar* decision.

In *Aguilar* the court held that where an affidavit supporting a search warrant is based on hearsay information the magistrate must be informed of two sets of circumstances: first, some of the facts from which the informant has concluded that the items to be seized are where he claims they are; and second, some of the facts from which the officer concludes that the informant is credible or his information reliable. 378 U. S. 108, 114. The affidavit here is deficient under this standard, because no information was given to the magistrate regarding the first set of circumstances. Nothing was said regarding the basis on which the informant concluded that there was dynamite at Rice's house. The affidavit also fails the second part of the *Aguilar* standard, since the other averments in no way deal with the credibility of the unnamed informant or attempt to show that his information is reliable by, for example, detailing subse-

quent police corroboration of the tip. See *Spinelli v. United States,* 393 U. S. 410, 416-418 (1969).

This is not the end of a proper analysis however, since *Aguilar* has been supplemented by *Spinelli.* In that case the Supreme Court held that an affidavit not satisfying the *Aguilar* standard is still acceptable if the averments in the affidavit, aside from the tip, so corroborate the tip that it is "as reliable as one which passes *Aguilar's* requirements when standing alone." 393 U. S. at 416. When, as here, the manner in which the informant gathered his information is not told to the magistrate, the court in *Spinelli* held:

> " . . . (I)t is especially important that the tip describe the accused's criminal activity in sufficient detail that the magistrate may know that he is relying on something more substantial than a casual rumor circulating in the underworld or an accusation based merely on an individual's general reputation."
>
> 393 U. S. at 416

Spinelli used *Draper v. United States,* 358 U. S. 307 (1959), as the standard for determining whether the tip described the criminal behavior in sufficient detail. In *Draper,* which as mentioned above involved probable cause to arrest without a warrant, the tip stated the address in Denver where the suspect had taken up residence; that the suspect had gone to Chicago on September 6, 1956, by train; that he was going to bring back three ounces of heroin; that he would return by train either on the morning of September 8, 1956, or the morning of September 9, 1956; that the suspect was a Negro of light brown complexion, 27 years old, 5 feet 8 inches tall, weighed about 160 pounds, and would be wearing a light colored raincoat, brown slacks and black shoes; that he would be carrying a tan zipper bag; and that he habitually walked fast. The obvious intent of the standard announced in *Spinelli* is to give the magistrate sufficient detail to make it apparent that the informant gathered

his information in a reliable manner and was not simply repeating unfounded rumors. The mere statement that "Rice keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers" does not describe the criminal behavior in the detail required by *Spinelli.*

Spinelli should not be read, however, as saying that the only way to make up for an affidavit deficient in the light of *Aguilar* is to describe the criminal behavior in a very detailed manner. The court goes on to state:

> "This is not to say that the tip was so insubstantial that it could not properly have counted in the magistrate's determination. Rather, it needed some further support. When we look to other parts of the application, however, we find nothing alleged which would permit the suspicions engendered by the informant's report to ripen into a judgement that a crime was probably being committed.
>
> 393 U. S. at 418

The relevant judgment here would be that David Rice's home contained dynamite and other illegal weapons. The affidavit in *Spinelli,* in addition to stating a tip concerning the operation of a handbook and wagering by telephone, contained a report of detailed F.B.I. surveillance on Spinelli, a confirmation that the telephone numbers listed in the tip were those of an apartment which the F.B.I. observed Spinelli enter, and an affirmation by the F.B.I. agent seeking the warrant that Spinelli was known to him and to local law enforcement officials as a bookmaker and gambler and associate of gamblers and bookmakers. The Supreme Court held that the behavior detailed by the F.B.I. surveillance contained no suggestion of criminal conduct and that the reputation for criminal behavior may not be used to give additional weight to allegations that would otherwise be insufficient. In Rice's case, the averments that he is a member and Minister of Information of the NCCF which advocates the violent killing of police, that a policeman has been killed, and

that arrests have been made from the membership of the NCCF, in no way suggest that dynamite would probably we stored at the petitioner's house. Perhaps such averments make it more likely that dynamite would be found in Rice's house than in the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is constitutionally protected free speech. *Yates v. United States,* 354 U. S. 298, 318-19 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not imply that dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. *Brinegar v. United States,* 338 U. S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is Minister of Information. But being Minister of Information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice was Weapons Minister or something of that sort, it would help tighten the inference down to a particular place. The key failing of the averments, then, is that they fail to tie down the storage of dynamite to any particular place. Such particularity is required before a search warrant may issue.

While I do not think that *Harris* changed the standards of *Aguilar* and *Spinelli,* it may be useful to analyze the present case against the factual setting of *Harris.*

Chief Justice Burger's plurality opinion in *Harris* relies upon *Jones v. United States,* 362 U. S. 257 (1960), for setting the standard for the quantum of information necessary to support a belief that an unidentified informant's information is truthful. The affidavit in *Jones* concerned the tip of an unidentified informant who claimed that he had recently purchased narcotics from the defendant. The tip also described the apartment where the informant alleged he had purchased the narcotics. The remainder of the affidavit swore that the informant was familiar to the affiant, that the informant had given information to the affiant before and that that information was accurate, and that the same information was given by other informants. Moreover, the tip itself was an admission against penal interest. In applying *Jones* to the facts in *Harris,* the Chief Justice characterizes *Jones* as stating that the affidavit is sufficient if there is a substantial basis for crediting the hearsay of the informant. The affidavit in *Harris* related a tip that the informant had purchased illicit whiskey from Harris at a specific house. It also stated that Harris had a reputation personally with the affiant as being a trafficker in nontaxpaid distilled spirits, that the affiant had received information from a variety of sources concerning Harris' activities, that illicit whiskey had actually been found on Harris' premises before, and that the affiant found the informant to be "prudent." The Chief Justice found substantial basis for crediting the hearsay here for the following reasons: first, it purported to relate the personal observations of the informant; second, it recited prior criminal behavior supporting of the reputation for criminal behavior; and third, the statement of the informant was against his penal interest. 403 U. S. at 581, 583. The Chief Justice noted that the affidavit contained no averment that the informant had previously given correct information as did the affidavit in *Jones.* The absence of such an averment, however, was found not essential to meeting the standard set down by *Jones.* 403 U. S. 573, 581-82. Applying the three factors critical to upholding the affidavit in *Harris* to the affidavit be-

fore this court, it can be seen that none of the three is present. The informant does not purport to relate his own personal observations; there is no recital of prior criminal acts by the petitioner to support a reputation for violence against police; and the statement of the informant is in no way against his penal interest. Hence, the affidavit in this case does not contain the pivotal facts relied upon by Chief Justice Burger in *Harris*.

Therefore, it is the holding of this court that the affidivat supporting the request for a search warrant did not give the magistrate probable cause to issue the warrant and that the warrant was therefore issued without probable cause.

II.

Even assuming the invalidity of the search warrant, the respondent argues that the search and seizure of the dynamite were proper, because done under exigent circumstances or in the course of a lawful search for Duane Peak.

The arguments on both sides of these questions were fully briefed to the Supreme Court of Nebraska in the petitioner's criminal appeal. The opinion of that court hints that the search and seizure might have been upheld on either of these grounds given the evidence before the court, but these issues were not explicitly decided by the Supreme Court of Nebraska, since it upheld the validity of the search warrant. This status of the case raises the question of whether the requirement of Title 28 U. S. C. § 2254(b) that available state court remedies be exhausted before the federal district court may reach the merits of an issue raised on habeas corpus has been fulfilled.

It is clear from *Picard v. Connor*, 404 U. S. 270 (1971), that all that is required is that the issue raised on federal habeas was previously fairly presented to the state's highest court. For a gloss on what this means the court cites *Wilwording v. Swenson*, 404 U. S. 249

(1971); *Roberts v. LaVallee*, 389 U. S. 40 (1967); and *Brown v. Allen*, 344 U. S. 443 (1953). None of these cases rests on drawing a distinction between presenting an issue to the state's highest court and presenting that issue and having it decided by the state's highest court. The thrust of these decisions is that once an issue has been decided by the state's highest court, that is sufficient for exhaustion even though the petitioner could use some other procedural device to challenge his conviction again in the state courts at the time the court is deciding the habeas matter.

Nevertheless, the language of *Picard* and of *Fay v. Noia*, 372 U. S. 391 (1963), is that of fair presentation and of an "opportunity to pass upon." Nowhere is there language suggesting that the state court must in fact pass upon the issue. *Picard* puts a paragraph gloss upon the requirement of fair presentation. The critical element is that the state court has the first opportunity to hear the very claim urged in federal court. In support of this proposition the court cites *Darr v. Burford*, 339 U. S. 200 (1950), and *Davis v. Burke*, 179 U. S. 399 (1900). Both of these cases also speak of the presentation of the issue first to the state court and are otherwise unilluminating.

Picard offers further enlightenment on what fair presentation means by holding that the presentation of the same facts to state court is not sufficient. The same constitutional claim must be brought to the attention of the state courts. The most telling paragraph of the entire opinion is as follows:

> ". . . Obviously there are instances in which 'the ultimate question for disposition,' *United States ex rel. Kemp v. Pate*, 359 F. 2d 749, 751 (CA7 1966), will be the same despite variations in the legal theory or factual allegations urged in its support. A ready example is a challenge to a confession predicated upon psychological as well as physical coercion. See *Sanders v. United States*, 373 U. S. 1, 16 (1963). Hence, we do not imply that respondent could have

raised the equal protection claim only by citing 'book and verse on the federal constitution.' *Daugharty v. Gladden*, 257 F. 2d 750, 758 (CA9 1958); see *Kirby v. Warden*, 296 F. 2d 151 (CA4 1961). We simply hold that the substance of a federal habeas corpus claim must first be presented to the state courts . . ."
404 U. S. at 277-78

The thrust of this paragraph and the cases cited therein as that exhaustion does not require either identity of legal theory or of factual allegation. The *Kemp* case is most enlightening in that it seems to require that the evidence in the record before the state court be essentially the same as that before the federal habeas court. The court in *Daugharty* arrives at essentially the same position in stating that the state court must be provided with all of the facts necessary to give application to the constitutional principle upon which the petitioner is relying. Neither of these cases, however, appears to be cited by the Supreme Court for the purpose of noting this part of the opinion.

The proper conclusion of all of this is that the United States Supreme Court opinions leave open the precise question before this court—namely, whether the Supreme Court of Nebraska was presented the substance of the federal habeas claim.

Further help may be found in *LeDent v. Wolff*, 460 F. 2d 1001 (C. A. 8th Cir. 1972). The court in footnote 2 states that the Supreme Court of Nebraska did not have the opportunity to pass upon an issue which was presented to it, since there was "no meaningful record for it to review on this issue." In *LeDent* no testimony was produced on the issue raised to the Supreme Court of Nebraska.

Thus this court must follow the standard announced in *LeDent*. After a careful reading of the entire record before the Supreme Court of Nebraska touching these issues, including the recently submitted police reports which were introduced into evidence in the hearing on the motion to suppress which took place prior to the petitioner's trial, it is the holding of this court that there was a meaningful record before the Supreme Court of Nebraska from which it could have decided these issues. Thus there has been exhaustion of available state court remedies and this court may decide these issues on their merits.

Before this court makes such a decision, however, it is desirable that all possible evidence on these issues be presented. This court has plenary power to conduct an evidentiary hearing and to try facts anew in cases involving the issuance of the writ of habeas corpus. *Townsend v. Sain*, 372 U. S. 293 (1963). I am hopeful that the record can be made more complete in the following two respects: first, evidence bearing on the issue of probable cause to believe that Duane Peak was in the petitioner's house at the time the search was conducted; and second, evidence bearing on the issue of whether the dynamite found in the petitioner's basement cubbyhole was in an area in which a man could hide and was in plain view.

This evidentiary hearing limited to these issues should be held as expeditiously as possible, since this case has been under consideration by this court for a very long time. The time for the hearing will be set by separate order following consultation with attorneys for the respective parties.

Dated March 29, 1974.

BY THE COURT

WARREN K. URBOM
Chief Judge

Footnote 1. The affidavit in support of the search warrant reads as follows:

"The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August 1970, who, being first duly sworn, upon oath says:

"That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

"That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha Douglas County, Nebraska.

"That said property is under the control or custody of David Lewis RICE, Minister of Information, National Committee to Combat Fascism.

"That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Committe [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the CCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons which he has said should be used against Police Officers.

"A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

"WHEREFORE, he prays that a search warrant may issue according to law."

Footnote 2. **Aguilar v. Texas**, 378 U.S. 108, 84 S. Ct. 1509 (1964); **Giordenello v. United States**, 357 U.S. 480, 75 St. Ct. 1245 (1958); **Wangrow v. United States**, 399 F. 2d 106 (C. A. 8th Cir. 1968), cert. denied 393 U.S. 933, 89 S. Ct. 292; **United States v. McDonnell**, 315 F. Supp. 152 (U.S.D.C. Neb. 1970). A possible exception is evidence tending to discredit or impeach the assertions of the affidavit. **United States v. Roth**, 391 F. 2d 507 (C.A. 7th Cir. 1967).

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

David L. Rice,

Petitioner,

v.

Charles L. Wolff, Jr., Warden of the
Nebraska Penal and Correctional Complex,

Respondent.

MEMORANDUM OF DECISION

(Filed July 5, 1974)

CV72-L-303

APPEARANCES: For petitioner, David L. Herzog
For respondent, Met Kammerlohr,
Assistant Attorney General

URBOM, Chief Judge

Pursuant to the memorandum and order of this court dated March 29, 1974, an evidentiary hearing was held on June 11, 1974, on the following issues: First, whether there was probable cause to believe that Duane Peak was in the petitioner's house on the night of August 22, 1970; and second, whether the objects found in the search of the house and introduced at the petitioner's trial were in plain view.

The issues as yet unresolved by this court are:

A. Whether the introduction into evidence of the dynamite and other items found in the petitioner's house on August 22, 1970, can be justified on the ground that the police were rightfully on the petitioner's premises to execute an arrest warrant for Duane Peak and the evidence was found in plain view;

B. Whether the introduction of these items into evidence can be justified on the ground that exigent circumstances were present at the time of the search of the premises; and

C. Whether the reception into evidence of dynamite particles found in the clothing of the petitioner after his arrest was constitutionally permissible.

If issue numbered A is to be resolved in favor of the respondent, it must appear, first, that the police were rightfully on the premises, and second, that the evidence seized was in plain view. The second question need not be reached if the police were not rightfully on the premises. Therefore, the first question to be resolved is whether the police were rightfully on the petitioner's premises in executing an arrest warrant for Duane Peak.

Resolution of this first issue depends initially upon whether the police were in fact at David Rice's house to execute an arrest warrant for Duane Peak. This need not have been their sole purpose in entering the house, but it must be one of their purposes. See *Jones v. United States,* 357 U. S. 493, 499-500 (1958). The record as a whole reveals that one of the officers' purposes in being at Rice's house was to arrest Duane Peak.

There is some discussion in the brief of the petitioner that the arrest warrant for Duane Peak was invalid, but there is no substantial evidence to support this claim and the issue has not been pressed by the petitioner. Hence, the discussion that follows will assume that the police had a valid arrest warrant for Duane Peak.

Testimony before this court in the evidentiary hearing just completed revealed that none of the officers participating in the search of the petitioner's premises had the arrest warrant for Duane Peak personally in his possession. Such possession is not required by the Constitution in order to validate an entry to effect an arrest. *United States v. Leftwich,* 461 F. 2d 586 (C. A. 3rd Cir. 1972), cert. denied, 409 U. S. 915; *Gill v. United States,* 421 F. 2d 1353 (C. A. 5th Cir. 1970), cert. denied, 400 U. S. 851. See Rule 4(c) (3) of the Federal Rules of Criminal Procedure.

The issuance of a valid arrest warrant, however, does not serve as a license to the police to enter a private dwelling to affect an arrest. The Fourth Amendment secures to the people of this nation "the right . . . to be secure in their persons, h o u s e s, papers, and effects, against unreasonable searches and seizures." In interpreting the meaning of this fundamental guarantee courts have held that a search is not reasonable unless the officer executing the arrest warrant had probable (or reasonable) cause to believe that the person named in the warrant is on the premises at the time of the entry. *Jones v. United States,* 357 U. S. 493 (1958); *United States v. Brown,* 467 F. 2d 419 (C. A. D. C. Cir. 1972); *Dorman v. United States,* 435 F. 2d 385 (C. A. D. C. Cir. 1970); *Michael v. United States,* 393 F. 2d 22 (C. A. 10th Cir. 1968); *United States v. Harris,* 391 F. 2d 384 (C. A. 6th Cir. 1968); *United States v. Chambers,* 382 F. 2d 910 (C. A. 6th Cir. 1967); *Lankford v. Gelston,* 364 F. 2d 197 (C. A. 4th Cir. 1966); *United States v. Alexander,* 346 F. 2d 561 (C. A. 6th Cir. 1965); *United States v. Blair,* 366 F. Supp. 1036 (U.S.D.C. S.D. N.Y. 1973); *United States v. Watson,* 307 F. Supp. 173 (U.S.D.C. D.C. 1969); *United States v Sims,* 231 F. Supp. 251 (U.S.D.C. Md. 1964). See D. Rotenberg and L. Tanzer, "Searching for the Person to be Seized." 35 Ohio State Law Journal 56-77 (1974) and Note, "The Neglected Fourth Amendment Problem in Arrest Entries," 23 Standford Law Review, 998-1008 (May 1971). The rationale for this requirement is that,

unless the person sought is on the premises, the officer executing the arrest warrant cannot accomplish his task, and entrance into the home to execute an arrest warrant should be permitted only when such entrance has a reasonable probability of achieving its goal.

The question for resolution, then, is whether the police had probable (or reasonable) cause to believe that Duane Peak was in the petitioner's house on the night of August 22, 1970. The courts noted above do not shed much light on just what probable or reasonable cause means in these circumstances. In the context of discussing probable cause to arrest the Supreme Court of the United States has offered some elucidation of the term. In *Brinegar v. United States,* 338 U. S. 160 (1949), the court said that the substance of all the definitions of probable cause is a reasonable ground for belief. It is more than a bare suspicion. Rather, "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed. *Carroll v. United States,* 267 U. S. 132, 162." 338 U. S. at 175-176. See also *Draper v. United States,* 358 U. S. 307, 313 (1959), and *Terry v. Ohio,* 392 U. S. 1, 21-22 (1968). The only court to articulate the standard in the context of determining probable cause to enter private dwellings to execute arrest warrants, even by implication, is the Fourth Circuit Court of Appeals in *Lankford v. Gelston,* 364 F. 2d 197 (C. A. 4th Cir. 1966). In that case the court gave its approval to a statement of the law of arrest in a regulation issued by the Police Commissioner of Baltimore. The regulation's relevant portions are as follows:

> "A police officer may make a peaceable or a forcible entry to search any premises for the purpose of arresting a person for whom an arrest warrant has been issued, if, but only if, the officer has probable cause to believe the accused person to be on the premises to be searched.

> "In this context, 'probable cause' is said to exist where the facts and circumstances within the officer's knowledge and of which he has reasonably trustworthy information are sufficient in themselves to warrant a man of reasonable caution to believe that the accused person is on the premises to be searched."
>
> 364 F. 2d at 200-201, n. 4

This standard, as is obvious, is deduced from the standard for probable cause in other settings. Such a deduction is eminently reasonably and will be adopted by this court as setting the constitutional standard.

Having achieved some articulation of the standard, this court is now in a position to assess the facts of this case. In so assessing the facts it is well to bear in mind that the burden of persuasion is on the petitioner to convince this court that the evidence should have been suppressed and thus that the police did not have probable cause to believe that Duane Peak was on the petitioner's premises on the night in question.

The evidence shows that the police at the time of the search knew of the following facts arguably showing a connection between Duane Peak and David Rice's house:

1. Duane Peak was a member and David Rice and Edward Poindexter were officers of the NCCF, which advocated violence against the police, and which had a limited membership;

2. David Rice's house had been used at times as a meeting place for the NCCF;

3. David Rice and Edward Poindexter had written articles in the NCCF newspaper urging violence against the police;

4. The focus of the investigation of the Minard killing was then on the NCCF;

5. There was probable cause to believe that Duane Peak planted the suitcase bomb that killed Officer Minard;
6. Donald Peak, Jr. implicated Edward Poindexter;
7. Arrest warrants had been issued for Duane Peak and Edward Poindexter;
8. An informant had told the police that he overheard David Rice in discussing the bombing say that the action was a week late and that Rice then laughed;
9. Another informant had told the police that David Rice had received orders from New York either to kill a police officer or lose the Panther franchise;
10. The police had reports that there was dynamite in the community that had not yet been found;
11. Duane Peak had been at David Rice's house in the past, but there had been no reports of his being there since the bombing;
12. Unsuccessful attempts had been made immediately before the search of Rice's house to find Duane Peak at the NCCF headquarters and at the home of Frank and Will Peak's parents, and generally on the near north side in Omaha;
13. The lights and television were on at David Rice's house when the police arrived, but no one responded to their knock at the door;
14. While Sergeant Swanson was at police headquarters typing out the search warrant affidavit there was a report that Duane Peak was in the Spencer Street Housing Project, the location of which is not revealed in the record;
15. None of the police reports of interviews with Duane Peak's relatives prior to the search of David Rice's house give any indication that Duane could be found at David Rice's house.

There was further testimony before this court which, if believed, would tighten the connection between Duane Peak and David Rice's house. Lieutenant James G. Perry testified that Delia Peak had told him that David Rice, Duane Peak and Edward Poindexter were constant companions and that he, Lt. Perry, was present when Donald Peak, Jr. told Officer Pitmon Foxall that Duane Peak was at David Rice's house when the bomb was made. Lt. Perry also testified that Duane Peak had not been seen in the last two days by his family and that they expressed concern that he may have been eliminated. The remainder of the record before this court specifically contradicts the claim that the police knew from Donald Peak, Jr. that Duane Peak was in David Rice's house when the bomb was made. These are the facts in the record: First the detailed police reports of Pitmon Foxall on his interviews with Donald Peak, Jr. on August 22, 1970, make no mention of Duane Peak's being at the Rice house when the bomb was made; second, no such fact was mentioned by either Lt. Swanson or Sgt. Pfeffer either before this court or in testimony at the state trial; third, no mention of this crucial fact was made in the affidavit to support the search warrant for searching David Rice's house; fourth, the rights advisory forms signed by Donald Peak, Jr. before his interviews on August 22, 1970, positively indicate that no one else was present at these interviews besides Donald Peak, Jr. and Officer Foxall; and fifth, the intial warrant for the arrest of David Rice was for possession of explosives and not for conspiracy to commit first degree murder, and this warrant did not issue until after the search of Rice's premises. This last consideration is significant, because immediately following Donald Peak, Jr.'s interviews, in which Duane Peak and Edward Poindexter were implicated in the murder, arrest warrants were issued for them charging them with first degree murder. Had Donald Peak, Jr. so implicated David Rice, surely a similar arrest warrant for him would have been issued at that time. Given these facts I simply cannot credit this testimony of Lt. Perry.

The fact that one part of Lt. Perry's testimony is not credible does not necessarily imply that the remainder is similarly tainted; by itself, it simply raises a question concerning his memory. Lt. Perry's testimony that Delia Peak told him that Duane Peak, Edward Poindexter and David Rice were constant companions is in no way corroborated by the remainder of the record before me. The police report of her interview reveals nothing about Duane Peak's being a constant companion of David Rice's, and the rights advisory form she signed indicates that only Sgt. R. Alsager and Richard Curd were present for her interview. Moreover, her interview did not begin until the very hour police first approached David Rice's house and was not completed until after the decision had been made to enter his house. The police report of her interview also reveals that she had seen Duane Peak at about 5:00 p. m. the night before. Thus, it simply is not so that Duane Peak's family had not seen him in the two days before they entered the petitioner's house and is persuasive that Delia Peak did not make a contrary statement. Finally, there is no indication in the police reports of interviews with Duane Peak's family prior to the entry of Rice's house that they were concerned that he might have been eliminated. On the basis of the entire record before this court and having heard and seen Lt. Perry testify, it is impossible for me to credit his testimony in the respects mentioned. Consequently, I find that his testimony in these respects cannot be included in the above catalogue of facts within the knowledge of the police at the time they entered the home of David Rice.

Lt. Perry also testified that he was the person who put David Rice's house on the list of places to look for Duane Peak. He testified that he did so because Delia Peak told him that David Rice, Duane Peak and Edward Poindexter were constant companions and because Donald Peak, Jr. told Officer Foxall that Duane Peak was at Rice's house when the bomb was made. Since both of these statements are not creditable, the most that can be said is that the record does not reveal why Lt. Perry placed

Rice's house on the list of places to be searched for Duane Peak. Lt. Swanson testified that the only information he had tying Duane Peak to the house was that Duane Peak and David Rice were members of the NCCF and that Duane Peak had been known to go to that house for meetings.

Based on the above catalogue of facts it is the finding of this court that the police officers did not have probable cause to believe that Duane Peak was in David Rice's house at the time they searched it on August 22, 1970. The critical considerations are that the place searched was not the residence of the person sought pursuant to the arrest warrant, that there had been no reports of Duane Peak's being at the home of David Rice for at least five and a half days prior to entry, that none of Duane Peak's family suggested looking for him there, and that the police had a contemporaneous report that Duane Peak was elsewhere. Such facts could not warrant a man of reasonable caution to believe that Duane Peak was in the house at the time of entry. It is a fair inference from the facts to say that Rice's house was a place Duane Peak might be. But this was not sufficient to permit entry, absent consent from the person whose house it was. The fact that the television and lights were on and there was no response to the police knock certainly would authorize the inference that someone had been there recently. Whether it, standing alone, would authorize the inference that someone was there at the time is questionable. In *United States v. Watson*, 307 F. Supp. 173 (U.S.-D.C. D.C. 1969), the court held that the facts that the police had called the house of the person to be arrested prior to going to the house and received a busy signal and that the radio was playing when the police arrived at the house did not give the police probably cause to believe the homeowner was at home at the time of entry, since they saw and heard no other signs of physical presence. I need not decide this issue, however, because in any event the fact that the lights were on and the television playing in no way indicated that Duane Peak was a person present at David Rice's house.

This court is not unmindful of the case of *Vance v. State of North Carolina,* 432 F. 2d 984 (C.A. 4th Cir. 1970), which held that on the facts before it the absence of an indication in the record that the police had any particular reason for believing that the person sought pursuant to the arrest warrant was on the premises searched was not fatal to the validity of the conviction in question. The crucial fact distinguishing this case is that the premises in question in *Vance* were the premises of the person sought in the arrest warrant. Here, Peak did not live at or own the premises searched. Moreover, the court in *Vance* stressed that the entry was made in the early afternoon and not at night. Hence, the rule announced by the court in *Vance,* read against the background of *Lankford v. Gelston,* supra, appears to be that if the entry is made during normal daylight hours, the police have probably cause to believe that the person sought in an arrest warrant is at his home. Whatever the validity of this rule in this circuit, it has no application to this case.

My decision that there was not probable cause to believe that Duane Peak was at David Rice's house at the time of the search in no way will seriously hamper proper police investigation of crimes such as the murder of Officer Minard. Had Duane Peak in fact been in Rice's house a careful police surveillance of the house would no doubt have revealed his presence while at the same time preserving the fundamental rights guaranteed by the Fourth Amendment. Such surveillance procedures may take somewhat longer to apprehend the person sought, but the price of shortening the search by allowing an arrest warrant to serve as a license to search private dwellings where the person sought *might be* simply is too high.

The respondent has pressed another argument for allowing police presence in David Rice's house at the time of the search. In oral argument before this court following the evidentiary hearing the respondent argued

that the existence of exigent circumstances should reduce the level of probable cause required. This argument is urged both as to the search for the dynamite and the search for Duane Peak.

The doctrine of exigent circumstances was developed originally in regard to warrantless searches for things. See *McDonald v. United States,* 335 U. S. 451, 456 (1948). The basic theory is that in certain exigent circumstances a search without a search warrant is reasonable under the Fourth Amendment. See *Terry v. Ohio,* 392 U. S. 1, 20 (1968). This theory has also been extended to apply to searches for persons. *Warden v. Hayden,* 387 U.S. 294, 298 (1967). Its application in these circumstances, however, has been limited to holding that a warrant was not necessary prior to entry. It has not, so far as this court can tell, been applied to hold that in certain circumstances the standard for probable cause is reduced. In fact, just the contrary seems to be true. In *Dorman v. United States,* 435 F. 2d 385 (C. A. D. C. Cir. 1970), the court indicates that a higher degree of probable cause is required for police action without the prior approval of the court.

Concerning justification for a warrantless search for the dynamite little need be said. The standard is that announced in *Coolidge v. New Hampshire,* 403 U. S. 443, 454-55 (1971):

> "... [T]he most basic constitutional rule in this area is that 'searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.' The exceptions are 'jealously and carefully drawn,' and there must be 'a showing by those who seek exemption ... that the exigencies of the situation made that course imperative.' '[T]he burden is on those seeking the exemption to show the need for it.'"

What are the exigencies that the respondent relies on? No concise list has been offered, but the following circumstances appear to be of concern to the respondent:

1. The murder was a terror bombing of a policeman;
2. There had been previous bombings that summer of police facilities;
3. The police had information that there was some missing dynamite out in the community;
4. The police feared further bombings;
5. The police had been working extremely long hours to solve this murder;
6. The investigation had focused on an organization that advocated violence against police.
7. Duane Peak might be eliminated.

This set of circumstances does not fit into any of the exigent circumstances exceptions to the warrant requirement that this court is aware of. There was no hot pursuit, no indication of a bomb about to go off, no cry for help from within, no arrest for a search to be incident to, and this was the search of a home and not an automobile or other readily moveable object. Moreover, the police by their own behavior in taking the time to secure a search warrant state a strong argument for holding that the situation was not so volatile as to require bypassing the magistrate. This is particularly true here where the source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as two and one-half months prior to the entry of Rice's house. Moreover, the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to suppress in the state criminal trial, Lt. (then Sergeant) Swanson testified as follows concerning the tip:

> "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places they might store it." (Transcript, Vol. II, 130:13-15).

Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip.

Given this record, this court will not carve out another exception to the warrant requirement. In so refusing, this court is mindful of what the Supreme Court of the United States said in *Coolidge v. New Hampshire*, supra, after stating that the exceptions to the warrant requirement are to be jealously drawn:

> ". . . In times of unrest, whether caused by crime or racial conflict or fear of internal subversion, this basic law and the values that it represents may appear unrealistic or 'extravagent' to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won—by legal and constitutional means in England, and by revolution on this continent—a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important." 403 U. S. at 455.

Concerning the search for Duane Peak, even less need be said. There is no doubt that it was imperative to find Peak quickly, perhaps for his own safety and certainly to apprehend a dangerous person and to further the investigation of a violent crime suffused with racial hatred. But the necessity here is no greater than it was in *Lankford v. Gelston*, supra, which intimates no reduction in the standard of probable cause to enter the private home of a third party. The respondent's argument that speed in apprehension was this imperative is weakened by the fact that the police took an hour out from their search for Duane Peak to secure a search warrant

for David Rice's house. Finally, it makes little sense, even from the point of view of speed in locating a suspect, to spend police time looking for him at a place where one does not have a reasonable belief that he will be. Thus, on this point also, I find no need to expand the doctrine of exigent circumstances.

Before turning to the last issue still unresolved by this court, a word about one other argument of the respondent is necessary. The respondent argues that this court should take account of the significant public interest involved in apprehending Duane Peak and balance this against the minimal invasion of privacy that took place in searching David Rice's empty house when Rice himself gave permission for anybody to stay in his house. No one can doubt the important public interest in apprehending an accused murderer of a police officer, but I think the respondent seriously mischaracterizes the interest involved in preventing invasions of privacy by the police. The privacy of one's home and the concomitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the p r i v a c y of one's home only if there is probable cause to believe that the criminal is in that home.

Therefore, it is the holding of this court that the police were not rightfully on the premises of David Rice on the night of August 22, 1970, and thus all of the evidence obtained by the search of the house that night was seized in violation of the Fourth Amendment and should not have been received into evidence at the petitioner's criminal trial.

The remaining unresolved issue concerns the introduction into evidence of the dynamite particles found in David Rice's clothing. These particles were obtained from the clothing that the petitioner wore at the time of his

arrest. The warrant upon which the petitioner was arrested and arraigned charged him with possession of an explosive substance. It did not charge him with murder or conspiracy to commit murder. (In fact, no murder warrant for his arrest was sworn out until August 31, 1970, the day on which Duane Peak first indicated that the petitioner was involved in the murder.) The petitioner turned himself in to the police when he heard that he was being sought. His clothing was taken from the petitioner as a part of the normal routine at the Douglas County jail for incarcerating persons accused of crime. The clothing was turned over by one of the jailers on August 27, 1970, a few hours after the petitioner surrendered himself, to Special Investigator Richard Curd of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service, who had participated in the search of Rice's house. Subsequently the clothing was sent to that Division's national laboratory in Washington, D. C., where the determination was made that certain particles found in the pants pockets were dynamite of the type that was used in the murder of Officer Minard.

The petitioner argues that this evidence should have been suppressed because it was obtained without a search warrant and because it is the "fruit of the poisonous tree." The petitioner's first argument has already been definitively answered by the Supreme Court of the United States in *United States v. Edwards,* — U. S. — (March 26, 1974). In that case the court held that the police are entitled to take the clothing of one validly arrested and subject it to laboratory tests and that those test results are admissible at trial. A search warrant need not be procured in such a situation.

The petitioner's second argument is of greater merit. His contention that the police would not have come upon the dynamite particles but for the arrest warrant which was issued as a direct result of the illegal search of his home is correct. Thus, the dynamite particles are taint-

ed with the illegality of the search and should also have been suppressed.

The doctrine of the "fruit of the poisonous tree" was first enunciated in *Silverthorne Lumber Co. v. United States,* 251 U. S. 385 (1920). There the court held that evidence illegally obtained by the police may not be used by the police in any way. Prior to *Silverthorne* the court had held in *Weeks v. United States,* 232 U. S. 383 (1914), that such evidence could not be introduced against the defendant at trial. *Silverthorne,* however, contained a limitation on the prohibition of the use of illegally obtained evidence:

> ". . . Of course this does not mean that the facts thus obtained become sacred and inaccessible. If knowledge of them is gained from an independent source they may be proved like any others, . . ." 251 U. S. at 392

This limitation was again stressed in *Nardone v. United States,* 308 U. S. 338 (1939), in which the term "fruit of the poisonous tree" was first used. In *Nardone* the Supreme Court acknowledged that:

> ". . . Sophisticated argument may prove a causal connection between information obtained through illicit wire-tapping and the Government's proof. As a matter of good sense, however, such connection may have become so attenuated as to dissipate the taint. . . ." 308 U. S. at 341.

The germinal opinion for analysis of the doctrine, however, is *Wong Sun v. United States,* 371 U. S. 471 (1963):

> ". . . We need not hold that all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police. Rather, the more apt question in such a case is 'whether, granting establishment of the primary illegality, the evidence to which instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.' Maguire, Evidence of Guilt, 221 (1959). . . ." 371 U. S. at 487-88.

This federally developed principle is applicable to the states. *Mapp v. Ohio,* 367 U. S. 643 (1961).

The critical question here is whether the dynamite particles were discovered by means sufficiently distinguishable from the illegal search to be purged of the primary taint. A careful reading of numerous appellate court decisions on what means are sufficiently distinguishable leaves one with the impression that this doctrine is not one of unadulterated clarity. There is very little law on the subject by the Eighth Circuit Court of Appeals. See *Peterson v. United States,* 411 F. 2d 1074 (C. A. 8th Cir. 1969), and *Standard Oil Co. v. State of Iowa,* 408 F. 2d 1171 (C. A. 8th Cir. 1969). Both cases assert that if the evidence is gained from a source independent of the illegal behavior, the evidence is admissible. In *Peterson,* the evidence was discovered prior to and thus independent of the illegal search and seizure. In *Standard Oil,* the court held that evidence seized illegally could be introduced at a later trial if the evidence was later obtained through authorized discovery proceedings. In so holding it determined at least one acceptable definition of an independent source. Such a source would include information available to the plaintiffs without resort to any clue or knowledge gained from the items unlawfully seized. 408 F. 2d at 1177. A reading of these cases together with several others' convinces this court that in order to purge the taint of the illegal search it must be shown that the discovery of the evidence was primarily attributable to a source independent of the illegal search. The fact that there was an intervening independent source which was also a "but for" cause of the discovery does not by itself remove the taint of the illegal search, if the illegal search nevertheless formed

the primary motivation or basis for the discovery of the evidence.

Before analyzing the evidence in light of this standard one preliminary question must be dealt with: Which party bears the burden of proof that the evidence used is poisoned fruit? *Alderman v. United States,* 394 U. S. 165, 183 (1969), and *Harrison v. United States,* 392 U. S. 219, 224-25 (1968), make it clear that in a direct criminal appeal the government, once an illegal search has been shown by the defendant, bears the ultimate burden of persuasion that the evidence introduced at trial is free from the illegal taint. It is equally clear that the general rule in habeas corpus actions is that the burden of persuasion is on the petitioner. *Johnson v. Zerbst,* 304 U. S. 458, 468-69 (1938); *Hawkins v. Bennett,* 423 F. 2d 948 (C. A. 8th Cir. 1970). Courts have drawn various exceptions to this general rule, however. *Naughten v. Cupp,* 476 F. 2d 845 (C. A. 9th Cir. 1972), reversed on other grounds, 414 U. S. 141 (1973), held that the rule in *Chapman v. California,* 386 U. S. 18 (1967), that once the petitioner has established the infringement of a constitutionally protected right, the burden shifts to the state to show that the error was harmless, applied in federal habeas corpus actions. Accord: *Bailey v. MacDougall,* 392 F. 2d 155 (C. A. 4th Cir. 1968). *Cooper v. Picard,* 428 F. 2d 1351 (C. A. 1st Cir. 1970), held that once the petitioner demonstrates that a police station confrontation took place in the absence of counsel, the burden is on the state to show that the in-court idenitfication was independent of the tainted lineup. The court thus was applying the rule announced in *United States v. Wade,* 388 U. S. 218 (1967), to habeas corpus proceedings. In a footnote in *Wade* the Supreme Court, per Mr. Justice Brennan, adopted the rule espoused by Mr. Justice Murphy in dissent in *Goldstein v. United States,* 316 U. S. 114, 124, n. 1 (1942), that:

> "[A]fter an accused sustains the initial burden, imposed by *Nardone v. United States,* 308 U. S. 338, of proving to the satisfaction of the trial judge in the preliminary hearing that wire-tapping was unlawfully employed, as petitioners did here, it is only fair that the burden should then shift to the Government to convince the trial judge that its proof had an independent origin." 388 U. S. at 240.

Mr. Justice Murphy in *Goldstein* cogently set forth the rationale for such a shift in the burden of proof by quoting from the opinion of the Circuit Court of Appeals:

> "'. . . this should be the rule in analogy to the well settled doctrine in civil cases that a wrongdoer who has mingled the consequences of lawful and unlawful conduct, has the burden of disentangling them and must bear the prejudice of his failure to do so; that is, that it is unfair to throw upon the innocent party the duty of unravelling the skein which the guilty party has snarled. To impose the duty upon the prosecution is particularly appropriate here, for it necessarily has full knowledge of just how its case has been prepared; given a prima facie case against it, i. e., "taps" and some use of them, it should do the rest.' 120 F. 2d 485, 488." 316 U. S. at 124.

Absent controlling authority to the contrary from the Eighth Circuit Court of Appeals, I think that the position taken by the First Circuit in *Cooper* is correct, since the knowledge of whether the evidence was discovered by means of an independent source is peculiarly the prosecution's. Thus once the petitioner has shown that there was an illegal search which was a "but for" cause of the discovery of the evidence sought to be suppressed, the burden is on the respondent to show that the evidence was obtained by a source independent of the illegal search.[2]

The evidence before this court shows that the only basis for the arrest of the petitioner at the time he turned himself in was formed by the evidence discovered in the illegal search of his home. The only piece of evidence additional to the list of fifteen facts noted above that the police learned after the search and before the petitioner's arrest was that Duane Peak and David Rice had a protracted conversation in front of the NCCF headquarters

on the afternoon preceding the bombing. This fact and the facts known to the police before the search do not amount to probable cause to arrest the petitioner, since they would not warrant a man of reasonable caution to believe that the petitioner had either murdered or conspired to murder Officer Minard. Thus, the illegal search was clearly a "but for" cause of the arrest warrant for the petitioner.

The evidence also shows that the issuance of the arrest warrant was the "but for" cause of the petitioner's surrendering himself for arrest. The substantial remaining question is whether the petitioner's surrendering himself as he did is an independent source primarily responsible for the discovery of the dynamite particles. I am convinced that it is not, because the petitioner would not have done what he did were it not for the illegal search conducted by the police. See *Harrison v. United States,* supra. In that case the Supreme Court held that the petitioner's choice to take the stand to rebut the illegal introduction of statements obtained from him did not make that testimony on the stand an independent source purged of the illegality of the use of the statements. The government did not show that its illegal behavior did not impel the petitioner to take the stand and thus his testimony was tainted by the government's illegal behavior, since there was no showing that it was truly independent of the misconduct. Here, also, there is no showing by the respondent that the surrendering for arrest was not impelled by the illegal search. The record, in fact, affirmatively shows that the invalid arrest warrant (since based substantially on the illegal search) was what in fact induced the surrender for arrest. The fact that the petitioner turned himself in for arrest does not provide an independent source for the introduction of the dynamite particles.

There is, however, a further act of the petitioner which must be examined. Had the petitioner not chosen to wear the pants he did on the day he decided to turn himself in, the dynamite particles in question would not

have been found. Is this act sufficient to break the causal chain between the illegal search and the discovery of the dynamite particles? The resolution of this question is not without difficulty, but this court is convinced that the respondent has not met its burden of proof on this point. The record reveals that the petitioner's clothes were taken from the jail clothing room within a few hours of his arrest by a special investigator of the Alcohol, Tobacco & Firearms Division of the Internal Revenue Service who had participated in the illegal search, for the purpose of being sent to that Division's crime laboratory for analysis. It also shows that up to the time of the seizure of the clothing the only substantial evidence linking the petitioner to the homicide was that discovered in the illegal search. The record also shows that it was routine procedure to place the clothes of a jail prisoner in safekeeping. It does not reveal, however, that it was routine procedure to send all clothing to a crime laboratory for analysis. The most reasonable inference from the record before this court is that the clothing was sent to the crime laboratory for analysis because of the suspicions engendered by the illegal search. Such conduct amounts to obtaining the evidence by an exploitation of the illegal search. It is just such conduct that *Wong Sun* condemns. Thus, here, too, there is no independent source for the introduction of this evidence.

This court is aware of the decision in *Hancock v. Nelson,* 363 F. 2d 249 (C. A. 1st Cir. 1966), which held that since the illegal detention in the case before it had nothing to do with the presence of blood on the clothing taken from the defendant at the jail after his arrest, the clothing was admissible and not the fruit of the poisonous tree. A strong dissent by Chief Judge Aldrich viewed this position as clearly an erroneous statement of the law. I am of the opinion that Judge Aldrich was correct.

Nor is this case at all similar to *Agius v. United States,* 413 F. 2d 915 (C. A. 5th Cir. 1969). In that case the defendant was improperly stopped and questioned by the police about a robbery. During the course of the

questioning the defendant voluntarily went to his car to find a receipt that would give the address of a person who could support his alibi. While searching for the receipt, the defendant inadvertently exposed to the view of the officers a toy gun which was later introduced into evidence at his trial. The court held that such an admission was not erroneous since the defendant's voluntary act broke the chain between the illegal action and the discovery of the evidence. No such break is present in the case before me, because it was the illegal search, rather than any voluntary act of the petitioner, that prompted the taking of the petitioner's clothes for laboratory analysis.

Thus, it is clear that the discovery of the dynamite particles is not attributable to any source independent of the illegal search. From what has been said above it is also clear that the connection between the illegal search and the discovery of the evidence is not attenuated in the sense discussed in *Nardone v. United States,* supra. The causal relationship is direct and proximate between the illegal search and the petitioner's surrender for arrest and between the illegal search and the seizure of the petitioner's clothing by the Alcohol, Tobacco & Firearms Division investigator, who also had participated in the illegal search.

Some lower federal courts have developed a further limitation on the doctrine. If the evidence which was in fact discovered only through the illegal behavior inevitably would have been discovered by legitimate means, the evidence is admissible at trial. *Gissendanner v. Wainwright,* 482 F. 2d 1293 (C. A. 5th Cir. 1973); *United States v. Seohnlein,* 423 F. 2d 1051 (C. A. 4th Cir. 1970). Other courts have refused to accept this limitation. *United States v. Castellana,* 488 F. 2d 65 (C. A. 5th Cir. 1974). Whatever the merits of this limitation, it has no application to this case. Even if it were inevitable that the petitioner would have been arrested without the illegal search, it was not inevitable that when arrested he would have been wearing the clothing which contained the dynamite particles. It was not inevitable, therefore, that the

dynamite particles would have been discovered absent the illegal search.

Finally, there is some law to the effect that evidence that is indirectly discovered because of illegal police behavior should be admissible unless suppression of such evidence serves a deterrent purpose. *United States v. Kennedy,* 457 F. 2d 63 (C. A. 10th Cir. 1972); *Harrison v. United States,* 392 U. S. 219 (1968) (dissenting opinion of Justice White). I do not find this to be the law at this time, but even if it were, I find that suppression in this case would serve a deterrent purpose, since the relationship between the illegality and the evidence discovered is so direct that it would be reasonable to infer that the police could conduct an illegal search in order to secure the arrest of a person whose clothing and fingernails they wanted to examine. I am not saying that this was the motivation in this case. In fact, the evidence gives no indication that this played any conscious part in the decision to enter the petitioner's premises. In order to show that excluding evidence of this type would have some deterrent effect on illegal searches it is sufficient to find that one could reasonably foresee that the police could engage in an illegal search in order to discover evidence on the person or his clothing when arrested.

Therefore, it is the holding of this court that the dynamite particles s h o u l d have been suppressed since they were fruit of the illegal search.

Since it is clear that the introduction of the evidence seized in the illegal search and the dynamite particles substantially contributed to the petitioner's conviction, that introduction was not harmless error. Therefore, the petitioner must either be released from custody or granted a new trial free from the tainted evidence.

An appropriate order will be entered as of this date so directing.

Dated July 5, 1974.

BY THE COURT

/s/ Warren K. Urbom, *Chief Judge*

Footnote 1.—**United States v. Owen**, 492 S. 2d 1100 (C. A. 5th Cir. 1974); **United States v. Castellana**, 488 F. 2d 65 (C. A. 5th Cir. 1974); **United States v. Resnick**, 483 F. 2d 354 (C. A. 5th Cir. 1973); **Gissendanner v. Wainwright**, 482 F. 2d 1293 (C. A. 5th Cir. 1973); **United States v. Miles**, 468 F. 2d 482 (C. A. 3rd Cir. 1972); **United States v. Brandon**, 467 F. 2d 1003 (C. A. 9th Cir. 1972); **Carpenter v. United States**, 463 F. 2d. 397 (C. A. 10th Cir. 1972); **United States v. Kennedy**, 457 F. 2d 63 (C. A. 10th Cir. 1972); **United States v. Cassell**, 452 F. 2d 533 (C. R. 7th Cir. 1971); **United States v. Fike**, 449 F. 2d 191 (C. A. 5th Cir. 1971); **United States v. Jackson**, 448 F. 2d 963 (C. A. 9th Cir. 1971); **United States v. Bacall**, 443 F. 2d 1050 (C. A. 9th Cir. 1971); **United States v. Edmons**, 432 F. 2d 577 (C. A. 2nd Cir. 1970); **United States v. Seohnlein**, 423 F. 2d 1051 (C. A. 4th Cir. 1970); **Agius v. United States**, 413 F. 2d 915 (C. A. 5th Cir. 1969); **Swinney v. United States**, 391 F. 2d 190 (C. A. 5th Cir. 1968); **United States v. Ruffin**, 389 F. 2d 76 (C. A. 7th Cir. 1968); **United States v. Jackson**, 387 F. 2d 115 (C. A. 4th Cir. 1967); **Green v. United States**, 386 F. 2d 953 (C. A. 10th Cir. 1967); **Hancock v. Nelson**, 363 F. 2d 249 (C. A. 1st Cir. 1966); **Leek v. State of Maryland**, 353 F. 2d 526 (C. A. 4th Cir. 1965); **Wickline v. Slayton**, 356 F. Supp. 140 (U. S. D. C. E. D. Va. 1973).

Footnote 2. This court is aware that **Gissendanner v. Wainwright**, 482 F. 2d 1293 (C. A. 5th Cir. 1973), contains language which places the burden on the petitioner to show that it was solely through an invalid source that his identity was ascertained. This case is distinguishable, however, because the poisoned fruit which the petitioners sought to take from the government was not a piece of evidence but their very identity as the alleged perpetrators of the crime. As Chief Judge Brown correctly noted, the thrust of **Wong Sun** and **Silverthorne** is basically a rule of evidence prohibiting the introduction of certain evidence. Identity as alleged perpetrators is not itself a piece of evidence where, as in **Gissendanner**, the tainted source identifying the petitioners was not introduced into evidence. The only use of the tainted evidence in **Gissendanner** was that it initially fingered the petitioners. Such is not the case here. The dynamite particles were evidence and they were introduced into evidence. Thus they fall within the thrust of **Wong Sun** and **Silverthorne**.

In the United States District Court

For the District of Nebraska

David L. Rice,

Petitioner,

vs.

Charles L. Wolff, Jr., Warden of the Nebraska Penal and Correctional Complex,

Respondent.

ORDER

(Filed July 5, 1974)

CV72-L-303

In accordance with the accompanying memorandum of decision,

IT HEREBY IS ORDERED that the petition for writ of habeas corpus is granted and the petitioner is to be released from custody unless within 90 days of the date of this order or, if an appeal is taken, 90 days after the decision of the United States Court of Appeals for the Eighth Circuit, whichever is later, the State of Nebraska retries the petitioner.

Dated July 5, 1974.

BY THE COURT

/s/ Warren K. Urbom, *Chief Judge*

APPENDIX III

United States Court of Appeals
For the Eighth Circuit
St. Louis, Mo. 63101

Robert C. Tucker, Clerk

February 19, 1975

Mr. David L. Herzog
1431 First National Center
Omaha, Nebraska 68102

Mr. J. Patrick Green
707 City National Bank Building
Omaha, Nebraska 68102

Hon. Clarence A. H. Meyer
Attorney General
2119 State Capitol
Lincoln, Nebraska 68509

Mr. Frank G. Carrington
Suite 960 State National Bank Plaza
1603 Orrington Avenue
Evanston, Illinois 60201

Messrs. Glen R. Murphy and Paul Kellar
International Association of Chiefs of Police, Inc.
11 Firstfield Road
Gaithersburg, Maryland

Re: No. 74-1682. David L. Rice vs. Charles L. Wolff, Jr., etc.

Dear Sirs:

Enclosed is copy of order entered by us today at the direction of the Court.

Very truly yours,

/s/ Robert C. Tucker, *Clerk*

db
Enc.

United States Court of Appeals
For the Eighth Circuit

No. 74-1682

September Term, 1974

David L. Rice,
Appellee,

v.

Charles L. Wolff, Jr., etc.,
Appellant.

Appeal from the United States District Court
for the District of Nebraska

The Court having considered petition for rehearing en banc filed by counsel for appellant and, being fully advised in the premises, it is ordered that the petition for rehearing en banc be, and it is hereby, denied.

Considering the petition for rehearing en banc as a petition for rehearing, it is ordered that the petition for rehearing also be, and it is hereby, denied.

February 19, 1975

SUPREME COURT, U. S.
FILED
AUG 5 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI FILED MARCH 27, 1975

PETITION FOR WRIT OF CERTIORARI GRANTED JUNE 30, 1975

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

APPENDIX

In The

Supreme Court of the United States

Term, 1974

—o—

No. 74-1222

—o—

CHARLES L. WOLFF, JR., Warden of the
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

—o—

**On Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit**

**PETITION FOR WRIT OF CERTIORARI
FILED MARCH 27, 1975**

**PETITION FOR WRIT OF CERTIORARI
GRANTED JUNE 30, 1975**

INDEX

	Page
Relevant Docket Entries	1
Petition for Writ of Habeas Corpus	4

INDEX—Continued

	Page
Return to Order to Show Cause	7
Special Instructions (see blank leaveout)	8
Plaintiff's Exhibit J—Affidavit and Application for Issuance of a Search Warrant	9
Plaintiff's Exhibit K—Search Warrant	10
Transcript of Testimony	13
Notation as to location of the decision and orders in question	8
Jack Dale Swanson—	
Direct Examination by Mr. Kammerlohr	13
Cross-Examination by Mr. Herzog	31
Redirect Examination by Mr. Kammerlohr	48
Recross-Examination by Mr. Herzog	49
Robert M. Pfeffer—	
Direct Examination by Mr. Kammerlohr	50
Cross-Examination by Mr. Herzog	58
Redirect Examination by Mr. Kammerlohr	63
Recross-Examination by Mr. Herzog	64
Reredirect Examination by Mr. Kammerlohr	66
Rerecross-Examination by Mr. Herzog	67
James G. Perry—	
Direct Examination by Mr. Kammerlohr	70
Cross-Examination by Mr. Herzog	73
Redirect Examination by Mr. Kammerlohr	74
Richard A. Curd—	
Direct Examination by Mr. Kammerlohr	77
Cross-Examination by Mr. Herzog	81

RELEVANT DOCKET ENTRIES

Date	Proceedings
1972	
Sep 29	1. Order (WKU) that Clerk file documents without costs; and Respondent Show Cause —10 days.
	Copy mailed to Petitioner and Attorney General.
	2. Petition for Writ of Habeas Corpus.
	3. Motion to proceed in forma pauperis and affidavit.
	4. Motion for Appointment of Counsel.
Oct 3	5. Order (WKU) appointing David L. Herzog, 1431 One First National Center, Omaha, Nebraska, as attorney to represent Petitioner.
	Copy mailed to counsel and petitioner.
Oct 10	6. Return.
Oct 26	7. Order (WKU)—brief of Petitioner by Oct. 30 and of Respondent by Nov. 13, 1972. Copy mailed to counsel of record and Petitioner.
Oct 31	8. Order (WKU) Fixing Brief Schedule. Copy mailed to counsel of record and Petitioner.
1973	
Apr 26	9. Courtroom Minutes—Trial before Judge Urbom—Submitted.
1974	
Mar 30	10. Memorandum (WKU) setting evidentiary hearing on limited issues in Order to be filed by the Court.

Date 1974		Proceedings
		Copy mailed to counsel of record and petitioner.
Apr 2	11.	Petitioner's Motion to Produce.
Apr 11	12.	Respondent's Return to Motion to Produce.
Jun 5		Entered 2 pleadings filed 6-4-74:
	13.	Petitioner's Motion.
	14.	Order (WKU) directing Clerk issue subpoenas for service without costs. Issued. Copy mailed to Petitioner and counsel of record.
Jun 11	15.	Courtroom Minutes—before Judge Urbom—Trial—Case submitted.
	16.	List of witnesses.
Jul 5	17.	Memorandum (WKU).
	18.	Order (WKU) that petition is granted and petitioner released unless within 90 days of the date of order, or, if an appeal taken, 90 days after decision of the United States Court of Appeals for the Eighth Circuit, whichever is later, the State of Nebraska retries the petitioner. Copy mailed to counsel of Record and Petitioner.
	19.	List of Exhibits.
Aug 5	20.	Respondent's Notice of Appeal. Copy mailed to Petitioner, David L. Herzog, J. Patrick Green and Joseph Pasquale, Court Reporter.
Aug 6	21.	Petitioner's application for Bail with request for Oral Argument.
Aug 6		Certified copy of notice of apppeal and two certified copies of all docket entries mailed

Date 1974		Proceedings
		to Clerk, U. S. Court of Appeals. Certified copies of docket entries mailed to Atty. General.
Aug 15	22.	Respondent's Order for Transcript. Certified copy delivered to Court Reporter.
Aug 16	23.	Courtroom Minutes—before Judge Urbom—Petitioner's application for bail (Filing No. 21)—Denied.
	24.	List of witnesses.
	25.	Order (WKU) denying application of petitioner for bail. Copy mailed to counsel and petitioner.
Aug 26	26.	Reporter's Transcript of trial 6-11-74.
Nov 15	27.	Appellant's Designation of the Record.
1975		
Feb 24	28.	Appearance and Application of William L. Kutmus, 210 Fleming, Des Moines, Iowa to be admitted to practice for bail hearing.
	29.	Application for Rehearing application for bail.
Mar 7	30.	Entered Order (WKU) filed 3-6-75 that application for rehearing on application for bail (@ 29) is stricken; and request by Mr. Kutmus for admission to bar of this court is denied (No. 28). Copy mailed to Petitioner, counsel of record and Mr. Kutmus.
Apr 16	31.	Petitioner's Application for Reconsideration of Motion for Bail. Request hearing.
May 5	32.	Certificate as to copy of portions of record forwarded to Supreme Court of U. S. as per request of Respondent counsel.

Date 1975		Proceedings
May	8	33. Memorandum and Order (WKU) denying application for reconsideration of motion for bail (No. 31).
		Copy mailed to Petitioner and counsel of record.

PETITION FOR WRIT OF HABEAS CORPUS

(Filed September 29, 1972)

TO: The Honorable, The United States District Court for the District of Nebraska.

The Petition of DAVID L. RICE respectfully shows as follows, to wit:

I.

Petitioner is a citizen of the United States of America and of the State of Nebraska.

II.

Petitioner is at present detained, incarcerated and imprisoned at the Nebraska Penal and Correctional Complex at Lincoln, Lancaster County, Nebraska, within the District of Nebraska, by Respondent, CHARLES L. WOLFF, JR., Warden, by virtue of a verdict of guilty and judgment and sentenced to a term of life imprisonment, pronounced by the District Court of Douglas County, Nebraska, per Honorable Donald J. Hamilton, District Judge, on April 17, 1971. After trial by jury, Defendant was found guilty of the crime of first-degree murder. The killing involved the death of Larry D. Minard, Sr., a member of the Omaha Police Division, City of Omaha, on August 17, 1970. Minard was killed while making a police call, when a bomb on the premises where he was making an investigation exploded. The conviction of Petitioner was affirmed by the Supreme Court of Nebraska on July 14, 1972. See 188 Neb. 728, — N. W. 2d — (1972).

III.

Petitioner is restrained, incarcerated and imprisoned pursuant to a sentence that is illegal and void in that the conviction rests upon evidence obtained through illegal searches and seizures in violation of the Fourth and Fourteenth Amendments to the Constitution of the United States of America. The prosecution introduced into evidence against Petitioner exhibits and testimony which were the produce of such illegal searches and seizures, all as more particularly detailed herein.

(a) On the evening of August 2, 1970, officers of the Omaha Police Division searched the home of Petitioner at 2816 Parker Street, in Omaha, Douglas County, Nebraska. Such search pursuant to a search warrant issued by one of the Judges of the Municipal Court of the City of Omaha, Douglas County, Nebraska. However, the affidavit filed with the application for the issuance of said search warrant failed to show probable cause for the issuance of such warrant, as is required by the Fourth and Fourteenth Amendments to the Constitution of the United States of America. During the course of such search, sundry items were discovered which were later introduced as exhibits at Petitioner's trial. Among the items found were a box of ammonia-type dynamite. Such dynamite was introduced as an exhibit, and Kenneth B. Snow, a chemist from the National Laboratory of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, testified that such dynamite was of the type used in the bomb which killed Larry D. Minard, Sr. Also found and introduced as an exhibit was a pair of pliers, which Roland L. Wilder, also an employee of the National Laboratory of the Alcohol, Tobacco and Firearms Division, testified had a cutting edge similar to the cutting edge of a tool which had been used to cut wire used in the bomb.

(b) On August 27, 1970, Petitioner was arrested and taken to the Douglas County jail where his clothing was taken from him. Subsequently, RICE's clothing was taken to the laboratory of the Alcohol, Tobacco and Firearms Division of the Internal Revenue Service, where it was analyzed. The analysis showed traces of ammonia dynamite within such clothing. The clothing was introduced as an exhibit at trial. Also introduced was the testimony of Kenneth B. Snow of the Alcohol, Tobacco and Firearms Division Laboratory as to the results of his tests showing the presence of dynamite. The arrest of Petitioner was based solely upon information obtained as a result of the search of his house at 2816 Parker Street. The clothing and the results of the chemical tests thereon were fruits of the unlawful search of 2816 Parker Street, Omaha, Douglas County, Nebraska, and were inadmissible for that reason. In addition, the seizure of the clothing and the physical testing of the clothing were performed without a warrant, when such warrant is required by the Fourth and Fourteenth Amendments to the Constitution of the United States of America. Initially, RICE's clothing was taken for safekeeping. It was only later, while he was in police custody, that a determination was made to have it tested. When the decision to have it tested was made, no emergency existed and ample time was available within which to apply to a Magistrate for a warrant. However, no such application was made. The seizure of the clothing was not incident to RICE's arrest, since it took place after his arrest and after the clothing had been taken for safekeeping by the police. In addition, no evidence existed which would have led the police to believe that there was probable cause to believe that the clothing contained any evidence relevant to the occurrence of any crime. Thus, even if the police could have seized the clothing without a warrant, there was no justification for the seizure.

IV.

Petitioner has exhausted State remedies, as required by 28 U. S. Code, § 2254. All the questions raised herein

were raised upon direct appeal to the Supreme Court of Nebraska from Petitioner's conviction. Such issues are not cognizable in a proceeding under the Nebraska Post Conviction Relief Act, § 29-301, et seq., Nebraska Reissue Revised Statutes, since the questions have been considered by the Supreme Court of the State of Nebraska.

WHEREFORE, Petitioner prays:

(a) That a Writ of Habeas Corpus be directed to Respondent, issued in his behalf;

(b) That Respondent be required to appear in answer to the allegations of this Petition;

(c) That this Court order a production by Respondent of the transcript and Bill of Exceptions with regard to Petitioner's trial in the District Court of Douglas County, Nebraska, and determine the case upon those papers;

(d) That this Court relieve Petitioner of the unconstitutional detention and imprisonment; and

(e) That the Court grant such other and further and different relief as the Court may deem just and proper in the premises.

/s/ David L. Rice

Nebraska Penal and Correctional Complex, Lincoln, Nebraska

RETURN TO ORDER TO SHOW CAUSE

(Filed October 10, 1972)

Comes now the respondent and for return to the order to show cause filed herein, respectfully shows the court:

1. Denies that the search warrant mentioned in paragraph III (a) was issue without probable cause and further alleges that said search was in all respects within the constitutional requirements.

2. Respondent further shows the court that no constitutional rights of petitioner were violated in any other

respects mentioned in said petition and respectfully moves the court to examine the evidence in the state court records and, without further evidentiary hearing, determine the matters herein.

Respectfully submitted,

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex, Respondent,

By CLARENCE A. H. MEYER
Attorney General

By /s/ Mel Kammerlohr
Assistant Attorney General
Attorneys for Respondent.

NOTATION AS TO LOCATION OF THE DECISION AND ORDERS IN QUESTION

The opinion of the United States Court of Appeals is set forth in the printed Petition for Certiorari at Appendix I, pages 28-57.

The first memorandum opinion of the United States District Court for the District of Nebraska filed March 30, 1974, that the affidavit supporting the request for search warrant was insufficient and that there had been sufficient exhaustion of state remedies on the issues of searches without a valid search warrant is contained in the Petition for Certiorari, Appendix II, pages 58-72.

The memorandum opinion of the United States District Court filed July 5, 1974, that considering the searches as searches without a search warrant, they were not justified on other alleged grounds, is set forth in the Petition for Certiorari, pages 73-96.

The order of the United States District Court granting the Writ of Habeas Corpus is contained in the Petition for Certiorari at page 97.

The order of the United States Court of Appeals for the Eighth Circuit denying rehearing is set forth in the Petition for Certiorari at Appendix III, pages 98-99.

PLAINTIFF'S EXHIBIT J

In the Municipal Court of Omaha, Douglas County, Nebraska

State of Nebraska, County of Douglas, ss.

AFFIDAVIT AND APPLICATION FOR ISSUANCE OF A SEARCH WARRANT

The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:

That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.

That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816, In Omaha, Douglas County, Nebraska.

That said property is under the control or custody of David Lewis RICE, Minister of Information, National Committee to Combat Fascism.

That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha, and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also illegal weapons, which he has said should be used against Police Officers.

A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed.

WHEREFORE, he prays that a search warrant may issue according to law.

/s/ Sgt. R. Pfeffer

/s/ Sgt. Jack Swanson

SUBSCRIBED AND SWORN to before me this 22 day of August, 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

(Back side of Application for Search Warrant)

No. 70, Doc. 67, page —, District Court, Douglas County Filed in District Court of Douglas County, Nebraska September 2, 1970, Marvin S. Riefschneider, Clerk.

AFFIDAVIT and APPLICATION
SEARCH WARRANT
FOR

.....

(Address or person)

Filed this 27 day of August, 1970, Municipal Court, Helen Dinan, Clerk, Criminal Division.

PLAINTIFF'S EXHIBIT K

In The Municipal Court of Omaha, Douglas County, Nebraska

State of Nebraska, County of Douglas, ss.

SEARCH WARRANT

TO: Sgts. R. Pfeffer and Jack Swanson

WHEREAS, Sgt. R. Pfeffer and Sgt. Jack Swanson have made affidavit sworn to before me the undersigned _____, Judge of the Omaha Douglas Municipal, State of Nebraska, and

WHEREAS, I am satisfied that there is probable cause to believe that the following grounds exist for issuance of a search warrant, to-wit: David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occurred, in Omaha, and arrests were made, from the membership of the NCCF. We have been told in the past that David RICE was known to keep explosives at his residence, and also firearms, which he has said should be used against Police Officers.

You are, therefore, commanded, with the necessary and proper assistance, to search the following described place or person, to-wit: Single story frame house, white in color, on Parker Street at 2816, Omaha, Douglas County, Nebraska, for the purpose of discovering and seizing the following described property, to-wit: Dynamite, and Illegal weapons which would be contraband. Also the devices which might be used to construct weapons, or explosive devices which could be used to cause injury to persons, or damage to property, and, if found to seize and deal with the same as provided by law, and to make return of this warrant to me within ten days after the date hereof. This warrant shall be served at any time.

GIVEN under my hand this 22 day of August, 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

(Back Side of SEARCH WARRANT)

RETURN AND INVENTORY

State of Nebraska, County of Douglas, ss.

Sgt. Jack Swanson, being first duly sworn, deposes and says that on 22 August, 1970, I served the within warrant

and made a diligent search for the property described therein at the place, or person, mentioned therein, and seized and am in possession of the following described property, to-wit: 14 Sticks Dupont Red Cross Extra Strength Dynamite, 40 and 50%. 3 DuPont Elect. Blasting Caps., MS 25, 1 DuPont Elec. Blasting Cap. 3pcs assorted wire. 1 Marathon No. 499 RR 6 Volt Battery. 1 pr Homecraft wire dykes. 1 CeeTee Co. Pliers. 1 long nose dyke, made in Japan, orange grips. 2 3/8 XIX 3/4 inch permanent magnets. 1 Mosberg model 351 KC 22 Long Rifle, semi-automatic rifle. Ser. No. 54791. 1 Savage Arms Springfield Model 840 30-30 cal. bolt action rifle, ser No. 269438. 1 Mosberg Model 183D-B 3" shot gun. 1 Astra Model 600/43 9 Mm SemiAutomatic pistol ser No. 24143. 1 .225 or 30-30 cal magazine, cap. 4 rounds. 1 magazine capacity or caliber unknown.

Said property was inventoried in the presence of Sgt. Robert Pfeffer, Ptlm. Glenn Steimer, and a copy of said Warrant and a receipt for said property was (left at) 2816 Parker Street.

DATED this 22 day of August, 1970.

/s/ Jack D. Swanson
Sergeant Omaha Police Dept.

SUBSCRIBED AND SWORN TO before me this 27 day of August, 1970.

/s/ Simon A. Simon, *Judge*

Warrant and inventory return on this 27 day of Aug. 1970.

/s/ Simon A. Simon, *Judge of the Municipal Court, Omaha, Nebr.*

No. 70, Doc. 67, Page ....., District Court, Douglas County. Rice, David Lewis.

Filed in the District Court, Douglas County, Nebraska, September 2, 1970, Marvin S. Reifschneider, Clerk.

SEARCH WARRANT
FOR

.....

(Address or person)

Filed this 27 day of Aug., 1970, Helen Dinan, Clerk, Criminal Division.

TRANSCRIPT OF TESTIMONY

(Filed August 26, 1974)

(Page 3) The Court: This is a hearing pursuant to my order of March 29, 1974, to assist in the resolution of the question of whether the search of the Rice premises was proper and more particularly whether it may be justified on the ground that there was an arrest warrant for David Peak in existence, and further whether the items found in that search, or some of them, were within the Plain View Doctrine.

It appears to me that in view of my conclusion that the search warrant itself was invalid that the obligation devolves upon the government, the State to produce evidence touching the propriety of the search aside from the warrant. So I will permit you to move forward, Mr. Kammerlohr.

(Page 4) JACK DALE SWANSON

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

A. Jack Dale Swanson.

Q. Where are you now employed, Lieutenant Swanson?

A. I am a member of the Omaha Police Division in Omaha, Nebraska.

Q. How long have you been a member of the Omaha Police Department?

A. Fourteen years.

Q. And you were so acting on August 22, 1970?

A. Yes, sir.

Q. And all through that summer and year prior to that then, weren't you?

A. Yes.

Q. Now at the original trial of David Rice you testified that on that date, I believe, August 22, 1970, that you in company with what was referred as the task force, went out to the headquarters of the NCCF—do you recall that?

A. Yes.

Q. And that the reason that you went there was to execute an arrest warrant for Duane Peak and defendant Poindexter?

(Page 5) A. Yes.

Q. After you were unsuccessful in finding them there you testified you went somewhere else, I believe it was Peak's home, was it, or do you recall?

A. It was—I can't recall the exact address but it was the residence of William and Frank Peak.

Q. And you also testified that you were unsuccessful in finding either Duane Peak or defendant Poindexter at that address so that then you went to 2816 Parker Street which is the home of David Rice, the petitioner?

A. Yes.

Q. And you testified on direct questioning: What was your purpose in going to that address? Answer: We were looking for Duane Peak.

A. Yes.

Q. Do you recall that testimony?

A. Yes.

Q. Now will you just tell the Court in your own words why you would go to 2816 Parker Street to look for Duane Peak?

Mr. Herzog: Objection, without proper and sufficient foundation, self-serving, calls for a conclusion or opinion of the witness.

The Court: Objection overruled. He may answer.

(Page 6) A. For two years previous to this particular homicide I was a sergeant assigned to the Omaha Police Division, Intelligence Unit, and part of our responsibilities at that time were to maintain and keep records of militant or extremist groups who advocated violence against police officers or other city officials in the community. Our investigation showed that David Rice was a member of the Black Panther Party or the National Committee to Combat Fascism; and that his residence was 2816 Parker Street; and that this 2816 Parker Street was not only the residence of David Rice but was used periodically as a meeting place for other—for all members of that particular organization.

Mr. Herzog: I move, your Honor, that the testimony be stricken for the reason that it is not responsive to the question, it is self-serving, without proper and sufficient foundation, is hearsay; and for those reasons move that that testimony thus far be stricken.

The Court: The motion is denied. The answer will stand.

Q. Lieutenant Swanson, for this two-year period, among other things had there been a newspaper circulated around Omaha, Nebraska, purportedly representing either the Black Panther or NCCF organization?

(Page 7) A. Yes.

Q. And had you seen copies of that?

A. Yes.

Q. And there are copies in evidence in this case—

A. Yes.

Q. —as you probably know?

A. Yes.

Q. Did that newspaper list the name of David Rice, an officer in that organization, either the Black Panther or the NCCF?

A. Yes.

Q. And did articles appear with his—purportedly putting his name as the writer of them?

A. Yes.

Q. Now how about Duane Peak? Had you determined that he was also a member of the NCCF?

A. Yes.

Q. And before August 22, 1970?

A. Yes.

Q. And can you just tell us how you came about this information?

A. I can't remember specifically how we listed Duane Peak as a member. I know that in March, 1970, we listed him on the intelligence bulletin which we put out for the other members of the police division, as a (Page 8) member. And we got that type of information either through informants or personal observations at meetings where they wore specific garb of the organization; and also through surveillance on houses.

Q. Did the members wear a particular kind of garb when they had meetings?

A. Normally at meetings, rallies and so forth most of the members would wear buttons of some sort describing,

you know, their particular slogan of the month or something; and a lot of times black berets, or something.

Q. Did you, before you went to the residence of David Rice that date, August 22, 1970, when a subsequent search was had, did you have any information in your police records that Duane Peak had planted the bomb in question for the NCCF?

Mr. Herzog: I object to the form of the question, your honor, as being cumulative, leading and suggestive, lacking proper and sufficient foundation for receipt in evidence.

The Court: Would you read the question, Mr. Reporter?

Reporter: "Did you, before you went to the residence of David Rice that date, August 22, 1970, when a subsequent search was had, did you have any information in your police records that Duane Peak (Page 9) had planted the bomb in question for the NCCF?"

The Court: He may answer it yes or no or "I don't know"—one of the three.

A. Yes.

Q. What information did the police records show?

Mr. Herzog: Objected to as not the best evidence, hearsay, conclusions and opinions, your Honor.

The Court: Sustained.

Q. What information did you have in regard—you personally have in regard to that Duane Peak purportedly planted the bomb for the NCCF?

Mr. Herzog: Same objection, your Honor.

The Court: Overruled. He may answer.

A. I had knowledge that the County Attorney's office had issued an arrest warrant for Duane Peak for murder.

Q. Did you have knowledge that the police report reflected or that in the evidence in this case, that Donald Peak had told the police that his brother planted the bomb for the NCCF?

Mr. Herzog: Objected to as hearsay; conclusions and opinions; and not the best evidence.

The Court: Overruled. He may answer.

A. Yes.

Mr. Herzog: Your Honor, may I hear the last question (Page 10) and answer please?

Reporter: "Did you have knowledge that the police report reflected or that in the evidence in this case, that Donald Peak had told the police that his brother planted the bomb for the NCCF?" Answer: "Yes."

Q. And that brother was Duane Peak referred to?

A. Yes. Your Honor, could I make a correction on that last answer?

The Court: Yes, you may.

A. I can't recall now whether I had knowledge he allegedly made the phone call to lure the officers up to the house or whether he was the one—I don't recall what the report said, whether it was actually planting the bomb or making the phone call. It was one of the two.

Q. Before this task force left the police station did you have a briefing session of some kind?

A. Yes.

Q. And you were going out to execute the arrest warrants on Duane Peak and defendant Poindexter?

A. Yes.

Q. At this briefing conference was Captain Bruce Hartford present?

A. Yes.

Q. And Lieutenant Pfeffer?

(Page 11) A. Yes.

Q. And yourself?

A. Yes.

Q. And together with probably some other officers?

A. Lieutenant Perry.

Q. Did the members generally go over what information the police had obtained so far concerning where they might look for Poindexter and Duane Peak and why?

A. Yes.

Q. Could you tell the Court about that, what went on at the briefing session?

Mr. Herzog: Object to any testimony regarding the briefing session as there as there has been no foundation laid as to time and place where such a session took place.

The Court: Very well. That ought to be cleared up.

Q. What time of day and on what date was this briefing session?

A. As I recall it should have been around 4 or 4:30 in the afternoon.

Q. And this would be the same time and date that you went out to the NCCF headquarters?

A. Yes.

Q. And eventually over to David Rice's house, is that right?

(Page 12) A. Yes.

Q. Was the information that was passed among you at this briefing session information that had come officially to the police department in its investigation of the bombing of Officer Minard?

Mr. Herzog: Objection, your Honor. It calls for a conclusion and opinion as to what those documents are or the source of the information, without proper and sufficient fundation.

The Court: Objection sustained.

Q. Were the police officers at this briefing session exchanging information which had been acquired during the investigation?

A. Yes.

Q. Can you tell us generally what kind of information you received that would indicate where you should look for Duane Peak?

Mr. Herzog: Objection, your Honor. Hearsay, including the other objections.

The Court: Overruled. He may answer.

A. I am sorry. Could I have the question repeated?

The Court: Yes, you may.

Reporter: "Can you tell us generally what kind of information you received that would indicate where you should look for Duane Peak?"

(Page 13) Mr. Herzog: Your Honor, I would further interpose the objection that it is leading and suggestive, and the further objection as to foundation and hearsay.

The Court: Overruled. He may answer.

A. Well those of us that hadn't been involved in certain interviews that were going on at the station at that time were more or less brought up to date about some police interviews which yielded evidence that Duane Peak and Ed Poindexter were involved in a homicide; and then we were informed that warrants for the arrest of Ed Poindexter and Duane Peak had been issued; and it was decided that the first place we were going to look for both of these principals were the headquarters at 3508 North 24th Street.

Q. What headquarters were those?

Mr. Herzog: If the Court please, that was a rather long answer and I didn't get it all. May I have it repeated?

The Court: Yes, you may.

Reporter: "Well those of us that hadn't been involved in certain interviews that were going on at the station at that time were more or less brought up to date about some police interviews which yielded evidence that Duane Peak and Ed (Page 14) Poindexter were involved in a homicide; and then we were informed that warrants for the arrest of Ed Poindexter and Duane Peak had been issued; and it was decided that the first place we were going to look for both of these principals were the headquarters at 3508 North 24th Street."

Mr. Herzog: Thanks very much.

Q. Were those the NCCF headquarters?

A. Yes.

Q. Now you had had those headquarters under surveillance for a couple years, hadn't you?

A. Well this particular headquarters hadn't been the headquarters for that length of time. I would have to say several months.

Q. Several months?

A. Yes.

Q. How about—did they have any other official headquarters of the NCCF before that?

A. Yes; but I couldn't recall the addresses right now about the others.

Q. All right. Do you know personally whether or not Duane Peak had been seen going in and out of these headquarters prior to the actual bombing?

A. Yes.

Q. And had he?

(Page 15) A. Yes.

Q. And would this be a frequent occurrence or a rare occurrence would you say?

A. Well I would just have to say it was normal. There were certain people that were usually coming in and out of the house, and he was one of the people. It would not be unusual to see him there.

Q. And do you know any other members of his family—his immediate family?

A. No. I knew his cousins who frequented the house.

Q. What was his name?

A. Well William and Frank Peak.

Q. They were cousins?

A. Yes.

Q. At this briefing session did Captain Hartford stress the fact that he felt the police were acting in an emergency type situation?

Mr. Herzog: Hearsay, your Honor.

The Court: It may be but I will hear the answer. Overruled.

A. Yes.

Q. What were the facts as to the operation of the Omaha Police Department following the bombing of Officer Minard as to their work details?

Mr. Herzog: May I hear the question again please?

(Page 16) The Court: Yes, you may.

Reporter: "What were the facts as to the operation of the Omaha Police Department following the bombing of Officer Minard as to their work details?"

Mr. Herzog: It is immaterial, your Honor. It is not an issue before the Court. I will further object that the question is nonspecific and there is no proper and sufficient foundation that this officer of his own knowledge knows sufficient information to respond to that question. It is too broad.

The Court: Objection sustained.

Q. Following the bombing of Officer Minard did the Omaha Police Department continue operating on regular shifts?

Mr. Herzog: Same objection, your Honor.

Q. Or were officers required to work overtime, double shifts or anything of that nature?

Mr. Herzog: Same objection.

The Court: Overruled. He may answer.

A. I can't specifically recall anything in the uniform division. I know in our unit, the intelligence unit and in the homicide unit we were working exceptionally long days. In this particular phase of the investigation here most of them worked 36 hours.

Q. And were you the head of the intelligence division (Page 17) at that time?

A. Yes.

Q. Was it your feeling that there was in your judgment as a police officer any need for haste or any urgent or pressing situation that needed to be cleared up in a hurry for fear that danger of the public might be involved?

Mr. Herzog: Conclusion and opinion, your Honor.

The Court: It is, but I will permit him to answer.

A. Yes.

Q. What was your feeling in that matter as an experienced police officer?

Mr. Herzog: Immaterial, irrelevant.

The Court: Overruled. He may answer.

A. Well we knew that there was more dynamite in the community that hadn't been recovered and this was causing us a high amount of concern because—well we thought there may be more bombings.

Q. When you went over to 2816 Parker Street as you testified at the trial, you were looking for Duane Peak. Do you know about what time the night you arrived there?

Mr. Herzog: If your Honor please, the question calls for a conclusion and opinion of the witness; and it misstates the evidence—improper.

(Page 18) The Court: In what way does it misstate the evidence?

Mr. Herzog: For the reason that the officer has testified that he—well perhaps I should withdraw my objection at this time and cover that on cross-examination.

The Court: Very well. Overruled. He may answer.

A. I believe we got to the house around 9:30 P. M.

Q. Did you knock on the door?

A. Yes.

Q. What happened?

A. Yes.

Q. What happened?

A. We received no answer.

Q. And ~~were~~ there lights on or anything going on inside the house?

A. There was a television set playing inside the house.

Q. And then what did you do? Was the door unlocked or did you have to break it down, or how did you get in?

A. At that particular time we decided to, based on other information we received, we decided to apply for a search warrant before we went into the house.

Q. All right. And did you leave some officers around the house and some went to get the search warrant—is (Page 19) that what happened?

A. Yes.

Q. Now the search warrant isn't involved today, so you are back to the point when you did enter the house. How many officers were there at that time?

A. I would say altogether probably 10 or 12.

Q. And were you the one that led them into the house?

A. As I recall I was the first one that went down the basement, but I can't really recall whether it was myself or another officer that actually entered the house first.

Q. When you entered the house how did you proceed?

Mr. Herzog: Your Honor, I am sorry to interrupt. May I interpose an objection, to reserve and preserve my objection to any further inquiry on this line of questioning for the reason the Court has ruled on the search warrant already, and that is the ruling of the court, and that any further testimony would authorize adducing testimony as a result of an illegal search and seizure or seizure effort. The testimony to date indicates that entry was after a search warrant had been obtained, and that is all the thrust of the meaning of the testimony as I gather at this point. I would object to the testimony for the (Page 20) reason that it is the product of an illegal search and seizure and an unreasonable search and seizure.

The Court: It seems to me I am not in a position now to decide whether the entry aside from reliance upon the search warrant is valid; not being in a position to rule on that at this moment because I haven't heard all the

evidence, and I will overrule your objection and hear the rest of this testimony. Do you want the question reread to you, sir?

A. Yes.

Reporter: "When you entered the house how did you proceed?"

A. Well the first thing we wanted to establish is whether or not Duane Peak was in the house and so some officers instituted a search of the upstairs area, and I and others went down in the basement. We started to search the house for Duane Peak.

Q. You were aware, as you have already testified, there was a arrest warrant out for Duane Peak and Edward Poindexter, were you not?

A. Yes.

Q. And despite the fact you had a search warrant were you still attempting to execute those arrest warrants?

(Page 21) A. Well a search of the house for Duane Peak was first because, to avoid any danger, if anybody in the house was armed we wanted to find that first, before we searched for any evidence.

Q. What I am asking is, despite the fact you took the precaution to get a search warrant you were still attempting to execute the arrest warrant when you entered David Rice's house, is that correct?

A. Yes.

Q. Did you know whether or not Edward Poindexter and Duane Peak frequented David Rice's house previous to this time?

Mr. Herzog: Objection. It calls for a conclusion and opinion.

The Court: Overruled. He may answer, if he can.

Q. And had they?

A. Yes.

Q. When you entered this house did you storm in or did you go in very carefully?

A. Very carefully.

Q. And what was the reason for that?

A. Well we were afraid if there were dynamite in the house it may possibly be wired.

Q. You were afraid there might be wires strung around you (Page 22) might stumble over and set off a bomb or something?

A. Yes.

Q. Did you see any tools or anything of that nature when you entered the main part of the house?

A. Yes.

Q. And can you just tell us where those things were —what they were as you best recall and where they were lying?

A. Well as we came in the kitchen door right in the kitchen, I believe it was against the west wall, there was a kitchen counter with cabinets above, and there were— I can't recall the exact location of each item, but there were some tools and wires and things laying around on the counter.

Q. Were the wire and tools that have been introduced in this case the ones you are referring to?

A. Yes.

Q. Were they in plain sight?

A. Well I can't recall the exact location of those specific tools because I didn't collect that evidence, but I recall seeing things on that counter. Specifically I recall seeing wires and stuff laying on there.

Mr. Herzog: Your Honor, I would like to renew the same objection and perhaps if I may have a continuing objection, subject to the Court's (Page 23) previous ruling?

The Court: You may. It is overruled.

Q. And you said you led a group to the basement of that same house?

A. Yes.

Q. This was shortly after you entered the house and looked around upstairs?

A. Yes.

Q. Would you tell us just what happened as you proceeded down the stairs of the basement and what you saw when you got there to the bottom?

A. Well as we went down the basement stairs there was a corner that as soon as you got to the bottom of the stairs you could turn to the right and there was a space that sort of went back into the basement wall sort of; and we were going to look in there for the possibility of anybody hiding or over behind the furnace or just any place where somebody could be hiding down there, and that's when we or I—I can't recall specifically now who saw it first, but when I looked down there was kind of a broken door, kind of leaning at an angle over a box, and I could see the cylinders of what were by then familiar to me, because we had been recovering this same type of dynamite in the past months in Omaha; and I recognized it as this 50 percent (Page 24) or 40 percent Dupont Red Cross dynamite we had been recovering.

Q. And you could see this dynamite in the box without removing anything?

A. Yes. I could see probably about a third of a cylinder.

Q. Were you using electric lights or flashlights or what?

A. Well I had a flashlight.

Q. Now handing you what has been marked as Exhibit A, Lieutenant, can you describe what that depicts?

A. Well this looks like the place where the dynamite was laying down there before we moved it, and the stairway would be back here (indicating). When you came down the stairway you turn to the right, and this would be back there (indicating).

Q. And that area shows what looks like it might be a water heater lying down there?

A. Yes.

Q. And where you saw the box would be to the right of where you saw the water heater then?

A. Yes.

Q. About what dimensions would you say the depth and width of that area were as you recall?

A. I would say probably 6 feet. It would be just a guess.

Q. Six feet deep and 6 feet wide both?

A. Probably not as wide as it were deep.

(Page 25) Q. There is also something purported to be a target. Was there a target or something in the back of that area?

A. Yes, sir; a pistol target with some holes in it.

Mr. Kammerlohr: I will offer Defendant's Exhibit A, your Honor.

Mr. Herzog: I only object to the materiality, your Honor.

The Court: Overruled. Exhibit A is received.

Q. About how large was the—you did remove the box and dynamite from that area, is that correct?

A. Yes; after close examination we did.

Q. You first examined to make sure it was not booby-trapped, is that correct?

A. Yes, sir.

Q. About how large a box was this you are referring to that the dynamite was in?

A. I believe the sticks were 18 inches long and then the box was—oh, it could have been 2 feet or something like that. The dynamite was stacked across.

Q. After you removed the box of dynamite what did you do with it immediately?

A. I carried the dynamite upstairs and I believe I handed it to Officer Glenn Steimer, who placed it (Page 26) in the trunk of our cruiser car.

Mr. Kammerlohr: May I approach the witness, your Honor?

The Court: You may.

Q. Handing you what has been marked Exhibit B, does that box in the trunk of that car appear to be the same box that you removed from the Exhibit A area?

A. Yes.

Mr. Kammerlohr: I will offer Exhibit B, your Honor.

Mr. Herzog: Only as to materiality will be the objection of the petitioner, your Honor.

The Court: Overruled. Exhibit B is received.

Q. You stated that you had seen dynamite similar to this on previous occasions?

A. Yes.

Q. So that when you came down there and flashed your light in this area you immediately knew that this was dynamite?

A. Yes; I recognized—

Q. You recognized—

A. I recognized what particular type this was.

Q. Did you find Duane Peak anywhere around that basement area?

(Page 27) A. No.

Q. Or in the house anywhere?

A. No.

Q. Did you find anybody in the house?

A. No.

Q. Did you look around through the house opening up closet doors and things of that nature?

A. Yes.

Q. Did you find Edward Poindexter in there anywhere?

A. No.

Q. Were you aware at that time that Edward Poindexter had been arrested yet?

A. I don't recall if I did or not.

Mr. Kammerlohr: I believe that is all, your Honor.

JACK DALE SWANSON

CROSS-EXAMINATION

By Mr. Herzog

Q. Lieutenant, on the date of August 23, 1970, you possessed the rank of sergeant, did you not?

A. Yes.

Q. And all your police reports published with reference to this matter would have your signature or your identification as Sergeant Jack Swanson, is that correct?

A. Yes.

(Page 28) Q. Lieutenant, at that time and as Sergeant Jack Swanson do you recall publishing a supplementary report under date of August 23, 1970, at the hour of 0007? Do you have your reports with you?

A. No, I don't.

Q. Do you recognize this copy (indicating) entitled "supplementary report?"

A. Yes. This is a report that I made.

Q. And does that report fairly and accurately reveal the state of your mind on the date on which it was created, 23, August, 1970 at 0007 hours?

Mr. Kammerlohr: Your Honor, may I examine that report before this witness answers the question?

The Court: Yes, you may.

Mr. Herzog: Let the record show I am tendering the document to counsel for respondent.

Q. Once again handing you a document counsel for the respondent has examined, would you read it to yourself and I would like to ask you a question when you have concluded reading it please.

A. Well I am familiar with the report.

Q. Is the name Duane Peak mentioned on that document?

A. No.

Q. Your memory of course is better with regard to the facts and circumstances on August 23, 1970 when this (Page 29) document was published and created rather than today?

A. I am sorry, but I—

Q. Is your recollection of the facts and circumstances surrounding the entry into 2816 Parker Street clearer today than it was on August 23, 1970?

A. No.

Q. In other words, the August 23 record, which document I have been handing you, which you have examined is much more accurate to your way of thinking?

A. In regard to the search warrant—

Q. Yes.

A. —is what that report deals with.

Q. Do you know where the original of this document is?

A. No.

Q. Were you acquainted with the fact that during the trial before the District Court copies of these police reports were voluntarily tendered by the State to defense counsel, inclusive of myself?

A. I will take your word for it.

Q. All right.

Mr. Herzog: Your Honor, may I have this document marked as an exhibit?

The Court: Yes, you may.

—(exhibit marked for identification)—

Mr. Herzog: For the purposes of impeachment (Page 30) Exhibit C is offered in evidence.

Mr. Kammerlohr: I object to this, your Honor, as irrelevant and immaterial at this particular time.

The Court: Overruled. Plaintiff's Exhibit C is received.

Q. Lieutenant, at the time of your first arrival at 2816 Parker Street you indicated in your direct examination you had just left the North 24th Street headquarters of the Panther Party, is that correct?

A. No.

Q. Had you on that date of August 22, 1970 then at the North 24th Street address—had in actuality an arrest been made at that time of one Robert Cecil?

A. Yes.

Q. Did you have a search warrant at that time to go into the Cecil premises?

A. I don't recall. We had an arrest warrant for Duane Peak and Ed Poindexter.

Q. If Officers Nepodal and Schuemann were present and if they were to testify that at 6:15 o'clock P. M. on August 22, 1970 that Edward Poindexter had been arrested, would that have been correct?

A. It probably is. I just simply can't recall when he was arrested.

(Page 31) Q. Did you have an arrest warrant on your person—you yourself when you went to 2816 Parker Street?

A. No.

Q. The briefing session, as I understand it, took place at 4 P. M., is that correct?

A. Around 4 P. M. sometime.

Q. Thereafter did you leave the Omaha Police facility where that briefing session took place?

A. Yes.

Q. And that police facility is located at 505 South 15th Street, Omaha, Nebraska?

A. Yes.

Q. After you left the briefing session at the police facility did you then go to the residence in Omaha, Nebraska where Mr. Cecil was arrested?

A. Yes.

Q. And from that point did you then travel to 2816 Parker Street?

A. No.

Q. Did you then travel back to the police station?

A. Yes.

Q. At any time after you left the place there where Mr. Cecil was arrested did you stop off or pass by 2816 Parker Street on the way to the Omaha police facility?

A. No.

(Page 32) Q. What was your purpose for going to the police facility after the scene where Mr. Cecil was arrested?

A. Well there was an arrest made at the scene and also a large amount of property taken from the house; and all the officers who participated in that particular search went back to the police building to make reports and mark evidence, and so forth.

Q. And you made a seizure, or you participated at the scene of the arrest of Mr. Cecil in the seizure and the cataloging and the preservation of the property which had been taken?

A. I went back to the police building. I can't recall right now what reports I made or—

Q. After going back to the Omaha police facility and after the arrest of Mr. Cecil and subsequent activity where did you then go? What was the next route?

A. Well we received an assignment from Captain Hartford to go to the known places of the NCCF and attempt apprehension of Duane Peak.

Mr. Herzog: May I have Exhibit C, your Honor?

The Court: You may.

Mr. Herzog: Thank you.

Q. It was generally your assignment, was it not, Lieutenant, that during the late evening hours of August 22, 1970 and early morning hours of August 23, 1970, the effort (Page 33) was and you were so instructed to arrest

members of the organizations, namely members of the Black Panther Party and the National Committee to Combat Fascism, also known as the National Front to Combat Fascism? Wasn't that the general order?

A. Well the report that was made at the time in regards to our assignment was made by Sergeant Volcek, which indicated that around 2130 or 2115, somewhere around there, we received an assignment to attempt to locate Duane Peak.

Q. How about the report of Sergeant Pfeffer, who indicated that the North 24th Street headquarters was raided for the purpose of seeking members of the Black Panther Party, the National Committee to Combat Fascism, also known as the National Front to Combat Fascism, in an effort to arrest members of these organizations in connection with the bombing death of Officer Larry Minard on the 17th of August, 1970?

A. Yes; there were two members named in the warrants.

Q. You knew Mr. Cecil was a member of the hierarchy of these organizations?

A. Yes.

Q. You knew Mr. Rice was a member of the hierarchy of these organizations?

A. Yes.

(Page 34) Q. You knew Mr. Poindexter was?

A. Yes.

Q. And there were other individuals who were either ministers or other members of the organizations that you knew about, did you not?

A. Yes.

Q. To be more specific, wasn't it true that at approximately 7:15 P. M. on August 22, 1970 Captain Hartford, Lieutenant Perry, Sergeant Pfeffer, Sergeant Volcek,

Sergeant Miller and yourself, then Sergeant Swanson, Officer Brisby, Officer Arnold Daily and Glen Steimer, together with Officer Dennis Howard, accompanied members of the Alcohol, Tobacco Tax & Firearms unit of the United States Treasury Department, went to 3508 North 24th Street, then known to yourself as the supposed headquarters of the Black Panther Party?

A. We did go there. I thought the raid was earlier. I was wondering if the time you read didn't reflect what time the report was made. I thought we went earlier in the day, around 5 o'clock.

Q. And did the named individuals that I am interrogating about go there in an effort to arrest members of these organizations, namely the Black Panther Party, the National Front to Combat Fascism, also known as the National Committee to Combat Fascism, in connection (Page 35) with the bombing death of Officer Larry Minard on 17 August, 1970?

A. My personal recollection of this particular search was for two specific parties that were named in arrest warrants who were also members of that particular group.

Q. Do you recall when this search commenced at the Rice premises at 2816 Parker Street, and would Exhibit assist you?

A. I believe around 10:30.

Q. That would be 2230 hours?

A. Yes.

Q. Using the 24-hour clock?

A. Yes.

Q. Lieutenant, you indicated that you knew that dynamite was in the community, did you not?

A. Yes.

Q. Did you also have intelligence or information that a burglary had occurred at a hardware store in Des

Moines, Iowa prior to the date of the death of Officer Minard on 17th August, 1970?

A. Yes.

Q. You also had information that the Hells Angels in Omaha, Nebraska had the dynamite or a part of the dynamite, at least the type that was involved in this case?

(Page 36) A. The Hells Angels?

Q. Yes.

A. I don't recall any information about the Hells Angels having it.

Q. Did you keep intelligence, did you cause surveillance as a part of your general police duties as part of the Intelligence Unit, to cover the activities of the Hells Angels?

A. Yes, sir. They are also a part of our responsibility.

Q. Was the SDS also monitored, the activities of the SDS?

A. Yes.

Q. On the University of Nebraska campus—were they also monitored?

A. The campus in Omaha?

Q. Yes.

A. Yes.

Q. Was the John Birch Society also monitored at that time also?

A. I don't recall any investigation on the John Birch Society.

Q. Officer, referring you to the 10:30 hour on 23 August, 1970 with reference to the premises of David Rice at 2816 Parker Street, you indicated that you ultimately arrived at the premises after leaving the Omaha Police Division Headquarters following the arrest of Robert (Page 37) Cecil?

A. Yes.

Q. Is that the correct sequence?

A. Well no; we went from 3508 North 24th to the Omaha Police Station; and then we received an assignment to attempt to locate Duane Peak, and we went out and started checking some addresses.

Q. You arrived ultimately after checking some addresses prior to your arrival at 2816 Parker Street, to 2816 Parker Street, did you not?

A. Yes.

Q. And you were accompanied by other police officers?

A. Yes.

Q. And were those officers Patrolman Steimer at that time, Officer Dennis Howard, Officer Dennis Taylor, Officer Mohatt, Sergeant Pfeffer and you, at that time, Sergeant Swanson, together with Sergeant Volcek?

A. Yes.

Q. 'You also met with Agents of the Alcohol, Tobacco Tax & Firearms Division, Daly, Curd, Sledge and Casper —they were also present?

A. At the time of the search.

Q. That was after your entry into the premises the A. T. & F. people came in?

A. No. The A. T. & F. personnel joined us at the police (Page 38) station while I was applying for a search warrant.

Q. Thank you.

Lieutenant, as I understand it, you knocked at the door or you were present when a knock issued for the door at 2816 Parker Street?

A. Yes.

Q. There was no response, is that correct?

A. No. No response.

Q. And then you noted a television set, is that correct?

A. Yes. I believe Sergeant Volcek said there was a television set playing. I don't know whether he looked in the window and saw it, or heard it; but there was a television set playing.

Q. Did you make any other attempt to enter into the premises?

A. No.

Q. At that time you had arrest warrants on your—you didn't have arrest warrants on your possession yourself, did you?

A. No.

Q. But did anybody in your party have arrest warrants?

A. No. We simply had knowledge of the arrest warrants.

Q. You then observed the television set. Did you have any other premises you were going to go to after 2816 Parker Street?

A. At that time we had a list of houses as possibilities, (Page 39) plus we were getting new addresses from informants so I imagine, although I couldn't tell you any specific addresses right now.

Q. You arrived at Mr. Rice's house, as I understand you walked up to the door, knocked on the door, noted the TV set on. Is that the time that you withdrew from the premises to travel to the Omaha Police facility once again to have a search warrant affidavit prepared?

A. Yes.

Q. How long were you absent from the Rice premises, if you can recall?

A. I would say probably an hour.

Q. Is it not a fact that you were required to travel from 2816 Parker to the police facility, prepare the search warrant affidavit and the search warrant itself, seek and procure a judge or magistrate to make the presentation to and then travel back with that signed search warrant to 2816 Parker Street?

A. Yes.

Q. And that is why you are indicating it took you at least an hour to accomplish all that?

A. That would be my estimate. I would say about an hour.

Q. Who accompanied you in the effort to procure the search warrant?

A. Lieutenant Pfeffer.

(Page 40) Q. At that time Sergeant Pfeffer?

A. Sergeant Pfeffer, at that time; yes.

Q. When you arrived at 2816 Parker Street again with the search warrant you had officers present who had kept the premises under surveillance, is that correct?

A. Yes.

Q. You then, on the strength of the search warrant signed by the Municipal Court, the judge sitting as a magistrate, entered into 2816 Parker Street, did you not?

A. Yes.

Mr. Herzog: Your Honor, I think I have concluded my cross-examination. Thank you.

The Court: Mr. Kammerlohr.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: I do have a few questions.

BY THE COURT:

Q. About what time was it do you think that you went to the NCCF headquarters where a so-called raid was made? About what time?

A. The way I recall it, your Honor, I thought it was around 5 o'clock in the afternoon.

Q. All right, sir. Do you have any idea about how long you remained there?

A. I think we were there probably around 45 minutes.

(Page 41) Q. Then you returned to the police station, is that correct?

A. Yes, sir.

Q. And about how long were you there, if you know?

A. I think it was sometime around 9 or 9:15 when we left the station.

Q. And then approximately when did you arrive at the premises of Mr. Rice?

A. It was around 9:30.

Q. Did you go any place, as you recall it, between the time you left the police station around 9 or 9:15, and when you arrived at the Rice resident?

A. Yes. The one house we did attempt to look through the residence of the parents of Frank and William Peak. I can't recall the exact address but I believe 35 something North 29th Street. We were denied entrance into the building. And there was also a police officer there, a Sergeant Foxall, who works with the Police Community Relations; and Sergeant Foxall told us that he had checked the house and he guaranteed us that Duane Peak was not in the residence.

Q. All right. Then you arrived at the Rice house about 9:30 right?

A. Yes.

Q. At that time, do I understand correctly, that is when you knocked on the door and made tthe observation that (Page 42) the TV set was on, and then you and Sergeant Pfeffer left to get a search warrant, is that correct?

A. Yes, sir.

Q. Was there discussion between you and Sergeant Pfeffer or between you and anyone else as to the reason for getting a search warrant before you left the Rice premises?

A. Yes, sir.

Q. What was it as you recall it?

A. Well one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite some place but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said "Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant." That was about our thinking on that.

Q. All right, sir. Did you have any discussion about the wisdom, other than the conversation you have just related, anything about the wisdom of going on into the Rice house to look for Duane Peak before getting, or without getting a search warrant?

A. Well of course, that was one of the alternatives and the thing we decided on then, that if we covered the (Page 43) house and if Duane Peak were in there he would be apprehended if he tried to leave, but if we didn't find evidence, and we finally did go in, we would have a search warrant.

Q. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?

A. No, sir. The only thing we had was a speculation because it was a known house of that particular group, and he was a member of that group and it was a place where he possibly might be.

Q. How many times do you know, or did you have information about Duane Peak's being at David Rice's house before you made the entry into that house?

A. I can't actually recall because at that particular time there were four officers assigned to me on the Intelligence Unit which conducted periodic surveillances of the different Black Panther Party houses. Now I would get information like there was a meeting tonight at 3508 North 24th and several people were there and some names or something. And I recall being told on some occasions that Duane Peak was at one particular address on Parker Street or out on North 24th because he was a relatively new member. I cannot actually ever recall myself seeing Duane Peak at 2816 Parker.

(Page 44) Q. Do I take it from what you have said, however, that you had received reports of some kind indicating that at some time or another he had been at that Rice house address?

A. Yes, sir.

Q. At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?

A. I can't recall.

Q. Now was there anything that you now can recall to tie Duane Peak to that Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of that NCCF, that Peak

had been known to go to that house for meetings and otherwise? Now anything else?

A. No; that was about the information we had.

Q. Were the other names of houses that you had on your list other houses of persons known or thought to be members of the same organization?

A. Well there were some houses where some members would show up from time to time, but actually the person who owned the house, at least we didn't have them actually listed as a member, but as being more of an associate. (Page 45) As I recall the principal houses at that particular time were the 3508 North 24th and 2816 Parker.

Q. When you returned to the Rice premises after going for the search warrant, which I take it would be about 10:30—?

A. Yes, sir.

Q. —in the evening. Did you then have the arrest warrant for Duane Peak with you or did anyone who was with you have it?

A. No.

Q. With respect to Defendant's Exhibit A, which is the photograph of the area in the basement where you indicate the dynamite was found, where was the door that you have mentioned?

A. Well the box would be right—just about like this (indicating); the box of dynamite. Now there is a door, or actually a part of a door with broken glass and stuff in it—in very poor condition—was laying kind of across the corner of the box at any angle. Sort of like that (indicating). And when you looked down, straight down, you saw the corner of the box about like this (indicating) with the cylinders sticking out into view there.

Q. All right. Will you make a mark please there? Perhaps that red pen would work—of the approximate (Page 46) location of the box?

—(witness marks exhibit)—

A. It would be behind the pipe.

Q. All right. So that even though your mark appears to be across and in front of the pipe, the box itself was behind the pipe?

A. Right.

Q. All right. And the door then was lying somewhat on top of that but not entirely covering the box so that some of the dynamite was protruding from the door, right?

A. Yes, sir.

Q. Now in order to see the area which is shown by Defendant's Exhibit A was it necessary to open any kind of door or other fixture?

A. No, sir. The basement light was on that you can see right at the top of the picture there, and there is no door. The only—as I recall I think there was a door upstairs to go down to the basement. That's the only door that was open.

Q. Now was the stairway to the right of this picture?

A. The stairway would be on your left.

Q. On my left. All right, sir. In other words, anyone looking at this picture, it would be to that person's left?

(Page 47) A. Yes.

Q. Approximately how high was the area which I refer to as a cubbyhole where this dynamite was found?

A. Well just estimating I would say probably 4 feet.

Q. You think from the bottom level which is just below the little box you have drawn as the location of dynamite, from there up to what apepars to be the top of a wall—

A. Yes.

Q. —which is just below a light bulb would be approximately 4 feet?

A. That would be my best guess, Judge.

Q. All right, sir.

A. I am sure it was deeper than it was high.

Q. Now by depth are you talking about the distance from the front where a person would be standing if he were standing near where that pipe is that is in the picture?

A. Yes.

Q. Back to the—

A. Back to the—

Q. —far end?

A. Right.

Q. Is the box in which the dynamite was found in the same condition in Defendant's Exhibit B as it was when you (Page 48) first saw it in the basement?

A. Yes, it is identical.

Q. With no lid on it?

A. No cover.

Q. Was there a battery found by you some place in the house?

A. Yes, sir. Upstairs in the living room there was a 9 volt battery of the same type that was on the bomb. This particular battery was hooked up to some kind of a sideline lighting apparatus as I recall.

Q. Where was it specifically when you found it?

A. It would have been on the east wall of the living room, which is in the front part of the house against the east wall.

Q. Was it covered in any way—hidden?

A. It was behind—I don't know quite how to—I guess you would call it a partition. It was behind the partition lying on the floor, and it was hooked up with some kind of a lighting bulb.

Q. How did you happen to look behind the partition?

A. To see if anybody was back there.

Q. How big an area was it back there?

A. After I looked back there it wasn't very big. I would say it was about, maybe a foot from the wall, and it was long, probably 6 feet I suppose.

(Page 49) Q. And how tall?

A. Maybe 4 feet.

Q. Is it correct that the long-nosed needle pliers and regular pliers and wire cutters were not actually found by you?

A. Yes, sir.

Q. What about the blasting caps? Were they found by you?

A. As I recall Sergeant Pfeffer found the blasting caps.

The Court: All right. Now any further questions, Mr. Herzog?

Mr. Herzog: No, your Honor. Thank you.

The Court: Mr. Kammerlohr.

JACK DALE SWANSON

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. Lieutenant, when you were sent out on this assignment to make the arrest of Duane Peak and Edward Poindexter, was this done by Captain Bruce Hartford?

A. The assignment came from Captain Hartford but I believe I got the message from Lieutenant Perry who actually was in charge of the investigation at that time.

Q. And do you know where the arrest warrants were at that time?

A. As close as I could—I remember Captain Hartford had the arrest warrants out at 3508 North 24th.

(Page 50) Q. He had them with him at that time?

A. Yes.

Q. That was the headquarters earlier in the day of the NCCF?

A. Yes.

Mr. Kammerlohr: I have no further questions.

JACK DALE SWANSON

RECROSS-EXAMINATION

By Mr. Herzog

Q. Officer Hartford or Lieutenant Hartford was present at the headquarters on North 24th Street with two warrants?

A. Yes.

Q. One for Peak and one for Poindexter, is that correct?

A. Yes.

Q. Was he present at 2816 Parker Street?

A. No.

Q. And you learned about the existence of the warrants not from Lieutenant Hartford but from another police officer?

A. Captain Hartford presided at this briefing, and I know this is where I found out about the arrest warrants.

I can't specifically remember how I found out about the arrest warrants. It might have been from the County Attorney's office.

(Page 51) Mr. Herzog: That is all I have, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, sir.

ROBERT M. PFEFFER

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

—recess at 2:27 P. M.—

—resumed at 2:37 P. M.—

Q. State your name please.

A. Robert M. Pfeffer.

Q. How do you spell that last name?

A. P-f-e-f-f-e-r.

Q. What is your present position?

A. At the present time I am a lieutenant, Omaha Police Department.

Q. How long have you been with the Omaha Police Department?

A. Eighteen years.

Q. What was your position in August, 1970?

A. I was a sergeant assigned to the Homicide Unit, Omaha Police Division.

Q. Are you the same Sergeant Pfeffer that testified at the trial of David Rice who is a petitioner in this case?

(Page 52) A. Yes.

Q. You heard the testimony of Lieutenant Swanson just immediately preceding your testimony today?

A. Yes.

Q. Were you present at the briefing session that was held on August 22nd, 1970 at the Omaha Police Headquarters?

A. Yes.

Q. Can you recall some of the other people that were present at that briefing session?

A. There was Sergeant Volcek, Sergeant Swanson, Lieutenant Perry, Captain Hartford and I believe Sergeant Miller was also there—and there were several others there.

Q. Can you tell us the reason for the briefing session —what they told you?

Mr. Herzog: I assume this is foundational, but I would still like to interpose an objection.

The Court: Overruled on the ground that it is foundational.

A. Well we were trying to locate Duane Peak, and we had information that other sources were trying to find him too, and we wanted to see if we could get him first before they eliminated him.

Q. Did you have knowledge or were you informed at that time that an arrest warrant had been issued for Duane Peak?

(Page 53) A. Yes.

Q. For the murder of Officer Minard?

A. Yes.

Q. How about—were you also aware that an arrest warrant had been issued for Edward Poindexter for the same murder?

A. Yes.

Q. About what time of the afternoon or morning on that date was this briefing session being held?

A. 1600, in that area—4 or 4:30 in the afternoon.

Q. Prior to this time had you talked to Donald Peak the brother of Duane Peak.

A. Yes, I did.

Q. And what did Donald tell you?

A. That is, his brother told him that he had been implicated—

Mr. Herzog: May I interpose an objection, your Honor?

The Court: You may.

Mr. Herzog: It is hearsay. I don't see this as being foundational, your Honor. It is not the best evidence.

The Court: Overruled. He may answer.

A. His brother had been involved in the bombing.

Q. Did he tell you anything—that his brother Duane was (Page 54) connected with the NCCF in that bombing?

A. He said that he was a member of the organization.

Q. And did he say anything as you recall, that he was acting on behalf of the organization?

A. I don't recall the exact words that he said, but it was my opinion at this time that he was acting on behalf of the organization.

Mr. Herzog: Move that the last part of the response of this witness be stricken, as it is an opinion and conclusion, your Honor.

The Court: Sustained. It is stricken.

Q. Was it impressed upon you at this briefing session that it was pressing and urgent that these arrests of Duane Peak and Edward Poindexter be made as soon as possible?

A. Yes.

Mr. Herzog: Your Honor, assuming this is foundational, I object to it. May I have a continual objection so as not to interrupt counsel for the respondent. Object to it as hearsay.

The Court: Yes, you may. Objection is overruled. He may answer.

A. Yes. At the briefing we were afraid that there might be more bombings and more deaths; and also we were afraid that the organization would get to Peak before (Page 55) us and eliminate him.

Mr. Herzog: Objection, your Honor. Move the answer be stricken as not responsive.

The Court: Denied. The answer will stand.

Q. Now Officer Minard had been murdered several days before this briefing session, is that correct?

A. Yes.

Q. And had you been working more than your usual amount of hours since that bombing?

A. Yes, sir, I did.

Q. Will you just tell us what the situation was?

A. We worked 56 hours straight at that time.

Q. Was this generally true of the officers in the Homicide Division?

A. Yes.

Q. When you went to 2816 Parker Street in Omaha, Douglas County, Nebraska, which you have been referring to as the David Rice home, you knew then that an arrest

warrant had been issued for Duane Peak and Edward Poindexter?

A. Yes.

Q. Did you have some conversation with someone after you arrived there about whether you should go on into the house at that time or whether you should go get a (Page 56) search warrant?

A. Sergeant Swanson and I talked it over. We had some difficulty at Frank Peak's house. And so we—there was some lights on, there was a television on, and we thought it would be better for us as a safeguard to get a search warrant along with the arrest warrant in case we found something else there besides Peak.

Q. Did you take the precaution of leaving an officer surrounding the house to—

A. Yes.

Q. —in case Peak or someone were in there?

A. Yes.

Q. Approximately how many officers did you leave around the house?

A. I don't recall.

Q. Do you know about how long you and Lieutenant, at that time, Sergeant Swanson were absent from the Parker Street house?

A. Well it was at least an hour or more.

Q. And when you returned there I suppose you checked with the officers to see if anything had happened in the meantime?

A. Yes.

Q. Had anything happened?

A. Not that I recall.

(Page 57) Q. Will you then describe what occurred after that? At that point did you enter the house?

A. I followed Sergeant Swanson in the house.

Q. And the other officers followed behind you?

A. Yes. I don't recall who all went in the house.

Q. Were there also some federal agents with you?

A. Yes.

Q. Did you personally find any tools or wire or anything of that nature which were subsequently introduced in evidence in this case?

A. Well I did find—well I was with Sergeant Swanson downstairs and also after the dynamite was removed I did find some dynamite caps and some wires upstairs.

Mr. Kammerlohr: May I approach the bench, your Honor?

The Court: You may.

Q. Handing you what has been marked as Exhibit A can you tell us what that is, if you know?

A. Well this is the cubbyhole or what I thought perhaps was a coal bin in the downstairs, basement of the home at 2816 Parker Street.

Q. And is that a fair representation of that area?

A. Yes.

Q. Do you have any opinion as to the approximate size of that area?

(Page 58) A. You mean the height and width and all that?

Q. Yes.

A. No, I don't know. I couldn't say but it's—you could just about stand up straight, or I could in it.

Q. Was the depth about the same as the height or deeper?

A. I think it was deeper than it was wide.

Q. And there is a marking on that photograph in red. Would you say that is about where the box of dynamite was located?

A. It is approximate I guess; yes.

Q. I believe at the trial you testified something about a door or something being in this area. Can you explain what the situation was as to that?

A. Well there was like—we had a flashlight, or Sergeant Swanson had a flashlight and he said "Here's some dynamite", and I looked over there; and then we cleared the area. I could see the box and he had his light on and you could see a round thing.

Q. You didn't actually mean you had to remove the door or anything to get to the box?

A. No.

Q. What was the situation that you described as a door?

A. It was at a slant like this (indicating). You could just see underneath it. There was a space under there.

Q. You didn't have to move anything in order to see the (Page 59) dynamite, did you?

A. No.

Q. Handing you what has been marked as Exhibit B does that appear to be the same or similar to the box of dynamite that was removed from that cubbyhole?

A. Yes.

Q. That's shown in Exhibit A?

A. Yes.

Q. Is that about the same amount of dynamite, as far as filling up a box is concerned?

A. Yes. Like I say, we didn't stay down there too long because we felt it might be rigged up some way or

another, and so I went upstairs; and someone else came up too. I don't know who. And I could see the box and I could see cylinders in it, but as far as the amount, I couldn't tell at that time.

Q. Where did you find the dynamite caps?

A. Well they were upstairs, and there was some linoleum that was rolled up, a cylinder of linoleum approximately this high (indicating). I believe it was the front room of the house. I just looked at it with my light and there they were, laying inside the cylinder.

Q. You mean they were inside the linoleum?

A. Yes.

Q. Roll?

(Page 60) A. Yes.

Q. Did you recognize them?

A. Yes.

Q. As dynamite caps?

A. Yes.

Q. Just by flashing your light in there?

A. No. There were some wires attached to—

Q. Well I mean you didn't have to open up the roll of linoleum—

Q. —in order to recognize them as being dynamite caps?

A. No.

Q. Did you say that you found any other articles that were introduced in evidence at the trial?

A. Well we all found some guns and some ammunition I guess. And there were other articles that I don't recall.

Q. Did you see the long-nosed pliers that were introduced in evidence?

A. They were on the counter but I never picked them up. I just came through the house at the time, and we were cautious because—

Q. Were they in plain view there on the counter?

A. Yes.

Q. Was this a one story house and basement?

(Page 61) A. Yes.

Q. Or did it have an upstairs in it?

A. Just one story and a basement.

Q. And did you look around in the various places for Duane Peak in there?

A. Yes.

Q. And you didn't find him or anyone else in the house other than the officers that were with you, is that correct?

A. Yes.

Q. After you left the premises was there a search continued then for Duane Peak?

A. Well I came down the station and helped catalog the evidence, and I don't know where all the other officers were. I can't even recall who was all there at the time.

Mr. Kammerlohr: I believe that is all.

ROBERT M. PFEFFER

CROSS-EXAMINATION

By Mr. Herzog

Q. Lieutenant, you indicated there was a briefing at about 4 o'clock in the afternoon or 1600 hours on 2400 clock?

A. About that time, yes.

Q. And at that time conversation was engaged in as to the (Page 62) desirability of apprehending Duane Peak, is that right?

A. Yes.

Q. At that time you were told that Duane Peak was at the premises of David Rice, 2816 Parker Street?

A. I was told that he was there? No, I wasn't told that he was there.

Q. You then left the police facility after the briefing and went to the location where Robert Cecil was arrested?

A. Yes, sir.

Q. And participated in that action?

A. North 24th Street; yes, sir. I was there.

Q. And from that location you then returned to the Omaha police facility with then Sergeant, now Lieutenant Swanson?

A. Well when I—after the—we went to North 24th Street I came back to the station with Cecil, and I didn't stay and conduct the search of the residence.

Q. What other activities did you engage in before going to 2816 Parker Street? Where did you go to?

A. Well I don't recall the exact address. We went to several houses. I do recall going to Frank Peak's house.

Q. Will Peak?

A. Will and Frank, I believe—I'm not sure.

(Page 63) Q. Looking for Raleigh's house?

A. Was I looking for him?

Q. Yes. Was that one of the names that—

A. No. I never went to his house or I never was looking for him.

Q. Do you know him to be a member of the NCCF?

A. Well I probably heard that he was.

Q. Were you connected with the intelligence squad at the time you accompanied—

A. No.

Q. —the then Sergeant, now Lieutenant Swanson?

A. No.

Mr. Herzog: Your Honor, I am advised that Lieutenant Swanson remains because he is one of the participants in the caravan that came down here, and even though I agreed that he could be released, I wonder if we could have him back in the courtroom, in the event that I would want to call him at a later time?

The Court: You may if he is still here.

Mr. Herzog: Thank you very much.

Q. After the initial contact with the 2816 Parker residence you indicated you were looking for Duane Peak, is that right, at that time?

A. Yes.

(Page 64) Q. You indicated you had a warrant for Duane Peak and Ed Poindexter and the truth is that nobody had a warrant for Peak or Poindexter except either Lieutenant Perry or another command officer. You didn't have a warrant?

A. We never had a warrant on our person but we knew there was a warrant issued.

Q. As I understand it you went up to the house, you observed lights on and a TV set going, and this was when you first arrived at 2816 Parker Street, is that correct? In your experience as a police officer, is this an indication of human activity?

A. Well with the TV on and the lights on we thought someone was possibly in the house; yes.

Q. You were at that time knowledgeable about the existence of the warrant, is that correct?

A. Yes.

Q. You left officers protecting the property until you secured the warrant from Judge Simon A. Simon, magistrate, in this matter and you returned then with then Sergeant Swanson and entered the house, is that correct?

A. Yes.

Mr. Herzog: Your Honor, may I have these three documents marked as exhibits?

(Page 65) The Court: Yes, you may.

Mr. Herzog: Your Honor, Exhibit D has been divided into respectively D-1, D-2 and D-3 and I am handing that exhibit to counsel for the respondent prior to an offer.
—(exhibit handed to counsel)—

Mr. Herzog: Your Honor, I am going to lay a little foundation first before I offer it.

The Court: You may.

Q. Lieutenant, would you take a look at these documents and I will ask you whether or not you recall having observed those documents on a prior occasion? And I am referring to D-1, 2 and 3.

A. Yes.

Q. Did you publish and are you the author of those documents?

A. Well my name is on it and I imagine I did, but I never typed it up.

Q. Do you recall dictating those words and phrases?

A. Yes.

A. And is that a fair transcription of your report on August 23, 1970 at approximately 0110 hours?

A. Yes.

Q. Now the red marks on Exhibit D-1, 2 and 3 are not yours, are they, Lieutenant?

(Page 66) A. Would you repeat that?

Q. The red marks (indicating)?

A. Oh, no, they are not.

Q. They do not belong to you?

A. No.

Q. During the regular course of your business as an Omaha police officer you are required to file reports as close to the occurrence of an event as possible?

A. Yes.

Q. And this is to create a most accurate record of what occurred, isn't it?

A. Yes.

Q. Now I will ask you whether or not Exhibits D-1-2-3 at any place contain any reference to Duane Christopher Peak?

A. Well the first paragraph.

Q. Other than the first paragraph does the document in its entirety refer to Duane Christopher Peak?

A. No.

Mr. Herzog: Your Honor, Exhibit D-1-2-3 are offered. I suspect the offer is infected with some irrelevant matter as to an Ethan Woods and a Michael Irwin Rice, but I offer it because it is the entire document relevant to the matter. The thrust of my offer has to do with the two-thirds (Page 67) of Exhibit D-1 only, for impeachment purposes.

Mr. Kammerlohr: We only object to the emphasis marks which have been added on by someone, your Honor.

Mr. Herzog: Those have been added by myself, your Honor, and I will stipulate that they should go out.

The Court: Yes. They will be disregarded. I have a copy of that report before me without those marks on it. Is there any reason why it shouldn't be marked and used rather than the one with the marks?

Mr. Herzog: That's fine, your Honor. We will substitute that one then.

Your, Honor, the substitution has been effected and counsel for the respondent has viewed the substitution.

The Court: Very well. Exhibits D-1-2-3 are received.

Mr. Herzog: Your Honor, may I withdraw the original D-1-2-3?

The Court: Yes, you may.

Mr. Herzog: And remove them from the courtroom?

The Court: Yes.

(Page 68) Q. Lieutenant, in your conversation with Donald Peak, relative to the testimony developed by Mr. Kammerlohr, Donald Peak never mentioned the name of David Rice, did he?

A. I don't recall. I don't have the transcript—if he said it at the time that I talked to him or not.

Mr. Herzog: Thank you very much. That is all the questions I have.

The Court: Anything further, Mr. Kammerlohr?

ROBERT M. PFEFFER

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. When you left the Rice house to go get the search warrant did you have any more information then to get a search warrant than you would have had say at 5 o'clock that same day?

Mr. Herzog: It calls for a conclusion and opinion, your Honor. It really is not probative or in response to anything elicited on cross-examination.

The Court: Overruled. He may answer.

A. Well we had the information from Donald Peak that his brother was involved and also that information from the intelligence squad that he had been seen with (Page 69) Rice and also had been in the area.

Q. You had that information when you left at 5 to go get the search warrant, or the arrest warrant, is that correct?

A. Yes; after the briefing and everything we had that information.

Q. So what you are saying is that when you left Rice's house to go get a search warrant it was kind of an afterthought?

Mr. Herzog: Asking for a conclusion and opinion, your Honor.

The Court: Overruled. He may answer.

A. Well like I say, as I said before, we had checked at Peaks and were met by Sergeant Foxall and he—we did have a confrontation with the older Peak and we—Foxall finally checked and found that the house was empty and he wasn't there, and so we thought, in order to avoid this situation, we would get a search warrant.

Mr. Kammerlohr: I believe that is all.

Mr. Herzog: Let me develop the afterthought business, your Honor, if I may.

The Court: You may.

(Page 70) ROBERT M. PFEFFER

RECROSS-EXAMINATION

By Mr. Herzog

Q. Do you mean to tell me that you walked up to 2816 Parker Street, observed all this human activity, and as an afterthought went and got a search warrant?

A. There was no human activity.

Q. The TV was on?

A. The TV was on.

Q. Lights were on?

Q. And this doesn't connote to you human activity?

A. Well it could I guess, yes.

Q. Once again, referring to Exhibit D, nowhere in the body of that description of your activities after arriving at the Rice house, was there revealed any of this so-called afterthought or this attempt to reduce the search warrant to less than what it is? You went to get a search warrant, did you not? There wasn't any sojourn, was there?

A. No. We went to get a search warrant.

Q. And your testimony is the same, is it not, as Sergeant Swanson, within the period of time that you were at the Rice house you did not see or observe any activities regarding Duane Christopher Peak, is that right?

A. No.

(Page 71) Q. Did you at that time even know what Duane Christopher Peak looked like?

A. Yes.

Q. Do you know how old he was?

A. Yes. He was 15.

Q. Do you know how old Mr. Rice was at that time?

A. I am not sure. I thought he was 26, 27; I am not sure.

Q. All right. You had been working all this time, and you had been getting feedback from various cruiser officers, as well as the homicide and intelligence units?

A. Yes.

Q. And prior to the time you went to the Rice house, the Rice house was identified as such, the residence premises of David Rice?

A. Yes.

Q. And nowhere in the feedback that you had been getting from the intelligence units actively investigating the killing of Officer Minard—I am saying within a few hours or a few days of August 22, 1970—there was no indication to you that Duane Peak was at 2816 Parker, isn't that a fact?

A. Not to me.

Q. Did Lieutenant Swanson, then Sergeant Swanson indicate to you orally that he had been advised that Duane (Page 72) Christopher Peak on August 22, 1970 was at the premises of 2816 Parker Street?

A. Not that he was there at the time; no.

Q. Moreover at the briefing—at the briefing when your command captain gave you the general information, did he tell you that Duane Christopher Peak was seen at 2816 Parker Street on 8/22—August 22, 1970?

A. No.

Mr. Herzog: Thank you, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: Yes, your Honor.

ROBERT M. PFEFFER

REREDIRECT EXAMINATION

By Mr. Kammerlohr

Q. At that briefing did they tell you that he had previously been seen at 2816 Parker Street?

A. Yes.

Q. And that there might be a possibility that he might be there?

A. Yes.

Mr. Kammerlohr: That is all, your Honor.

Mr. Herzog: May I, your Honor?

The Court: You may.

(Page 73) ROBERT M. PFEFFER

RERECROSS-EXAMINATION

By Mr. Herzog

Q. You mean to tell me that your command captain told you that specifically, that Duane Peak might be at David Rice's house? That is one of the specific items of information you recall today that occurred almost four years ago?

A. Not that he was at this certain house at the time but there was a possibility that he could be there at this time—or at one of these other houses that we checked.

Q. Your effort really on August 22, 1970, was it not, Lieutenant, was to arrest members of the NCCF period?

A. My assignment at the time was to try to find Duane Peak.

Mr. Herzog: Thank you very much. Thank you, your Honor.

The Court: Anything further, Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: Lieutenant Pfeffer, a question or two please.

By the Court:

Q. Respecting the blasting caps that were found upstairs in the Rice house, where were they with reference to any wall or object within the particular room?

A. Your Honor, they were in the what would be considered (Page 74) the front room against the wall; and they were in a—there were several aluminum—or lino-

leum shaped cylinders; well they were linoleum rolled into a cylinder and they were right inside there. The rolls were approximately this size (indicating).

Q. You are indicating about a foot in diameter?

A. Well, I wouldn't say a foot. I would say about this size (indicating).

Q. Eight or ten inches?

A. Yes; you could see in there.

Q. And there were several of these rolls lying together there, were there?

A. Yes. They were standing upright.

Q. All right. And you put your flashlight beam into the roll and saw the blasting caps, is that it?

A. I was just looking around and just looked in there.

Q. What were you looking for at the time, do you remember?

A. Well, after the dynamite was found we did see wires in the house, and we thought maybe the house was wired.

Q. That is, at places other than where you found the blasting caps you found some wires?

A. Yes.

Q. And that then led to your looking around at other places, including inside the linoleum rolls for other objects which might be connected with the dynamite?

(Page 75) A. Yes.

Q. I noted, Lieutenant Pfeffer, on Plaintiff's Exhibit D-1, which I understand is the first page of your report, it states—and I will show it to you in a moment—but while I have it I will read it: "We also found explosive caps, and wires hidden behind the radio in the front room of the Rice residence". Now are those the explosive caps that you are referring to?

A. No. The explosive caps were inside the linoleum but there was some wires behind the radio.

Q. I see. The wires were behind the radio, the explosive caps were inside the linoleum?

A. Yes.

Q. All right. And I take it, from what you have said, that these linoleum rolls were not otherwise covered; that is, the rolls themselves were not covered with anything, nor were they in any kind of container, right?

A. No, they weren't.

Q. Now with respect to these long-nosed pliers, when was it that you saw those?

A. Well as we came in the house we came in cautiously; and we were just looking at everything; you know, anything that would look suspicious; and there was some tools laying on the counter in the kitchen.

Q. Were these pliers in any kind of container when you saw (Page 76) them?

A. No; not that I can recall.

Q. Did you see these pliers before you went into the basement?

A. Yes.

Q. Did you again see them after you came up from the basement?

A. I believe there were other officers up there. They were checking other things; and I don't recall seeing them after that.

Q. Were you able to see those pliers without the use of your flashlight?

A. Yes; there was lights on.

Q. Did you have to move anything in order to see the pliers?

A. No.

Q. They were not inside a drawer?

A. No.

The Court: Very well. Anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, Lieutenant Pfeffer.

(Page 77) JAMES G. PERRY

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

A. James G. Perry.

Q. What is your present position, Mr. Perry?

A. I am a member of the Omaha Police Division, Lieutenant in charge of the Homicide and Assault Unit.

Q. How long have you been with the Omaha Police Department?

A. Twenty-two years.

Q. What was your job with the department in August of 1970?

A. I was in the Crime Against Persons Section on C Shift.

Q. Do you remember what rank you held at that time?

A. I was a lieutenant.

Q. And on August 22nd, 1970 were you present at a briefing session with Captain Hartford and Sergeant Swanson, Sergeant Pfeffer and some other people?

A. Yes, sir, I was.

Q. At the Omaha Police Department?

A. Yes.

Q. Can you tell us what the purpose of that briefing session was?

A. There was probably 15 or 20 officers at this briefing. The purpose of it was to inform the officers that we were going to the NCCF headquarters in an attempt to (Page 78) arrest Duane Peak and Edward Poindexter, who I had warrants for.

Q. You are the officer who had the warrants at that time?

A. Yes, sir.

Q. The arrest warrants?

A. Yes, sir.

Q. And this was a rather big task force sort of thing then?

A. Yes, sir. There were a number of officers assigned, not only to Panther headquarters but to residences of a number of Duane Peak's relatives.

Q. Was the house of David Rice one of the places designated as a place to search for Duane Peak?

A. Yes, sir.

Q. You proceeded to the headquarters of the NCCF, didn't you?

A. Yes, sir.

Q. But you weren't present in the group that went over to what we have been referring to as the David Rice house?

A. No, I was not. After our return to—after the arrest of Cecil at Panther headquarters and the removal of a considerable amount of evidence, we proceeded to Cen-

tral Station. I checked with the other units and they had not located Duane Christopher Peak or Mr. Poindexter; and I instructed the unit that they had not apprehended him yet and to proceed with their previous assigned (Page 79) houses to check.

Q. As an experienced police officer at that time, considering what had been going on in Omaha, did you consider it urgent and pressing to arrest Duane Peak as soon as possible?

A. Yes, sir. He was a key witness, and it became obvious during the day prior to the raid that he was a key witness. His family hadn't seen him for something like two days, and they expressed concern that he may have been eliminated by members of the organization. And also we were considerably concerned with possible future bombings or boobytrap devices.

Q. You were concerned for the public?

A. For the public, for ourselves and just generally cool any social unrest we had at the time.

Q. Had you been working more hours than usual in the interim from the bombing of Officer Minard until the task force on August 22nd, 1970?

A. From the 17th of August when this occurred to the 22nd it just seemed like I continuously worked. I don't recall having much sleep during that period of time.

Q. And was this true generally of the officers in your division?

A. Yes, sir.

Q. What was that division again, at that time?

(Page 80) A. Homicide and Assault Unit. At that time I was assigned to Crime Against Persons Section; but I was transferred to the Homicide Unit to take over the investigation.

Q. Would this be true of both units then?

A. Yes, sir.

Mr. Kammerlohr: I believe that is all, your Honor.

The Court: Mr. Herzog.

JAMES G. PERRY

CROSS-EXAMINATION

By Mr. Herzog

Q. The places designated for search for Duane Peak, according to your testimony, were relatives of Mr. Peak, such as his parents' residence?

A. Parents, uncles, brothers, sisters, who he had a number of.

Q. And also places not aunts and uncles that he may be at?

A. Yes, sir. His aunts and uncles indicated when you mentioned the name of Rice or Poindexter, that you would also see Mr. Peak in company with them.

Q. Was this by your own investigation?

A. Yes, sir.

Q. Were Mr. Peak, Rice and Poindexter the only members of the organization?

A. No. There were a number of other members, and they (Page 81) all intertwined—when you would see one you would see the other one.

Q. On the basis of your own observation also?

A. Yes, sir.

Q. See one you see them all?

A. When you see one you might see two or three. I had seen photographs taken by one of the surveillance units with Mr. Peak in the front yard of the NCCF headquarters.

Mr. Herzog: That is all I have, your Honor. Thank you.

JAMES G. PERRY

REDIRECT EXAMINATION

By Mr. Kammerlohr

Q. When you say "Mr. Peak" you mean Duane Peak?

A. Yes, sir.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: Anything further, Mr. Herzog?

Mr. Herzog: No, thank you, your Honor.

By the Court:

Q. Mr. Perry, let me inquire: Were you the one that made the list of places that the officers ought to go to look for Mr. Peak?

A. Yes, sir.

(Page 82) Q. What was it that prompted you to put David Rice's house on the list?

A. Well as I recall his sister, Delia Peak, told us that day that Rice and Poindexter and her brother were constant companions; and then later on Donald Peak indicated that his brother told him that they were up there when they constructed the bomb.

Q. Up where?

A. At Rice's home, sir.

Q. Now you had been told by Donald Peak that Duane Peak had been at Rice's home when the bomb was constructed that killed Officer Minard. Is that what you are saying?

A. Yes.

Q. When did you receive that information?

A. As I recall it was in the late afternoon.

Q. Of what day?

A. Of the 22nd.

Q. Had you made that interview yourself?

A. I was present when Sergeant Pitman Foxall interviewed Donald Peak.

Q. Did you have any information from any source that Duane Peak had been in David Rice's house within the day or two before August 22nd, which as I understand it, was the date of the search of the Rice house?

A. Not at that time, sir; no, sir. Just—we knew from (Page 83) past experience where these people hung out and where we would probably find them. I, along with Sergeant Swanson at that time—I had just gotten out of the Intelligence Squad, and I was thoroughly familiar with the individuals involved and their habits.

Q. Well specifically what do you mean by that with respect to whether Duane Peak was or might be at the David Rice residence?

A. I did not have any specific information that he would be there or had been there within a couple days of that.

Q. What information did you have other than the statement from Donald Peak that Duane Peak had been at that residence at the time of the construction of the bomb? What other than that did you have that he had been at David Rice's house on other occasions?

A. Nothing from Donald Peak and nothing prior or after the bombing; but personal observation and just prior to that is the only thing I had.

Q. By "personal observation" what do you mean?

A. Probably 6 months previous to that I was assigned to the Intelligence Squad.

Q. You had personally seen, I mean Duane Peak at the Rice residence?

A. And in the company of Rice at the headquarters.

Q. All right. And did you have other sources of information (Page 84) to the effect that Duane Peak had been at Rice's house before the bombing?

A. These sources were from Duane's sisters and brothers who indicated he had been there.

Q. All right.

A. And that he frequented there.

Q. And that information related to times before the bombing, is that accurate?

A. Yes.

Q. Did you have information from any source that he had been at the Rice house any time after the bombing?

A. No, sir.

Q. Did you have information from any source to the effect that Duane Peak had been in the company of David Rice after the bombing but before the entry into the house?

A. No, sir.

Q. Now you did give testimony on cross-examination about some relatives saying that if you saw one you would see them all. Would you give us the details about that? What specifically was said and when and by whom, if you know?

A. Well as I recall Delia Peak indicated that her brother was hanging around, and to her knowledge she thought he was living at the NCCF headquarters. And she called Poindexter D. C., which apparently meant deputy chairman; (Page 85) and she clarified that, that D. C. was Mr. Poindexter; and that Mr. Rice—the three of them, along with House and Cecil, all hung around together.

Q. All right. When was that information conveyed to you?

A. The afternoon before the raid, sir.

Q. And the comments, and I take it from Delia Peak were to the effect that he, Duane Peak, may well be living at the NCCF headquarters and regularly was in the company of these other persons you mentioned?

A. Yes.

Q. And by that you meant it to mean at the time she made the statement she thought it was true?

A. Yes.

The Court: Now anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: All right. You may stand down, sir.

RICHARD A. CURD

being first duly sworn, testified as follows:

DIRECT EXAMINATION

By Mr. Kammerlohr

Q. State your name please.

(Page 86) A. Richard A. Curd.

Q. What is your position at this time, Mr. Curd?

A. At that time, sir, I was special investigator with what is known as Alcohol, Tobacco & Firearms division of the U. S. Treasury Department.

Q. That was in August, 1970?

A. Yes, sir.

Q. Are you still with the Treasury Department?

A. Yes, sir, I am.

Q. They have changed the name since then, haven't they?

A. Yes, sir. They changed it to the Bureau of Alcohol, Tobacco & Firearms. We are now referred to as special agents.

Q. You have heard the testimony of various officers here today concerning an investigation that was made at the headquarters of the NCCF and at the home of David Rice in Omaha, Douglas County, Nebraska on August 22, 1970?

A. Yes, sir. I have heard portions of the evidence.

Q. Were you present in those investigations?

A. Yes, sir, I was.

Q. Were you requested to join the Omaha Police Department or how did you happen to get involved in the investigation?

A. We had been involved in several investigations in the Omaha area involving explosive situations, bombings, and so forth; and the particular one I had (Page 87) been on that day was on the explosives that resulted in the death of Officer Minard. I had been assisting the Omaha Police Department with what little expertise we had, laboratory facilities available in Washington, D. C. for the examination of evidence, and so forth. So I suppose I could best describe it as they then contacted us on the 22nd regarding participation in the activities that occurred there in the afternoon and evening hours.

Q. And were there other officers of your division with you?

A. Yes, sir, there were.

Q. How many years had you been with the division prior to August, 1970?

A. It would have been in the vicinity of 18 months at that time, I believe.

Q. About 18 months?

A. Yes.

Q. Did you consider after the bombing of Officer Minard that the circumstances in Omaha may be in danger of further bombings and other dangerous conditions?

Mr. Herzog: Object to this. It is cumulative, repetitive, irrelevant and immaterial.

The Court: Overruled. He may answer.

A. Would you repeat the question?

The Court: Yes. The reporter will read it.

(Page 88) Reporter: "Did you consider after the bombing of Officer Minard that the circumstances in Omaha may be in danger of further bombings and other dangerous conditions?"

A. Yes, sir, I did.

Q. As an officer of the unit dealing with explosives, was it your opinion it was imminent that this matter be cleared up as soon as possible for the protection of the public and othe police officers?

A. Yes, sir. That would be my opinion.

Mr. Kammerlohr: May I approach the bench, your Honor?

The Court: You may.

Q. At the home of David Rice did you accompany Lieutenant Swanson, then Sergeant Swanson and others to the basement of that house—of the Rice home?

A. Yes, sir.

Q. Handing you what has been marked as Exhibit A can you describe what that area depicts?

A. It is a partial basement of heating ducts and hot water heater and a bunch of old boards and stuff.

Q. Did you see a box of dynamite in that basement that night on August 22nd, 1970?

A. Yes, sir, I did.

Q. Was it anywhere in that general vicinity shown in that (Page 89) picture when you first saw it?

A. Yes, sir, it was.

Q. And was the box covered in any way or partially covered, or did you have to move anything to see the dynamite, or what are the facts as to that?

A. I don't recall having had to move anything in order to observe it; no.

Q. Were you familiar with the shape of dynamite sticks at that time?

A. Yes, sir.

Q. And when you looked in the box did you recognize what appeared to be—what appeared to you to be dynamite sticks?

A. Yes, sir.

Q. Did you see anyone move anything before you were able to recognize them as such?

A. I don't recall anyone moving anything.

Q. Do you have an idea of about how large the—how wide this area is and how high it is, and how deep it is in which this box of dynamite was found?

A. Well it was more rectangular shaped.

Q. Was it tall enough for you to stand it?

A. I get the impression in thinking back on it the quarters were rather confined.

Q. You might have been able to hunch over in there a little (Page 90) bit, is that it?

A. Yes, sir.

Mr. Herzog: I am going to object, your Honor. It is leading and suggestive.

The Court: It is. Stricken.

Q. Can you give us an idea—how tall are you?

A. About 6 foot, sir.

Q. Going by your general height, about how high would you estimate this area to have been?

A. Five foot maybe; maybe 5 by 5 by 10; or something like that.

Q. The largest number being the depth?

A. Yes, sir.

Q. Handing you what has been marked as Exhibit B, does that appear to be the box of dynamite that you observed in Exhibit A?

A. Yes, sir.

Q. Or one very similar to it?

A. Yes, sir.

Q. When you were accompanying the officers to the NCCF headquarters and to the Frank Peak residence, and later to the David Rice residence, were you aware that they were looking for Duane Peak under an arrest warrant?

A. Yes, sir, I was.

Mr. Kammerlohr: I believe that is all, your Honor.

(Page 91) The Court: Mr. Herzog.

RICHARD A. CURD

CROSS-EXAMINATION

By Mr. Herzog

Q. You possess a law enforcement specialty with regard to handling firearms and explosives, is that correct?

A. I am not sure I understand your question, sir, by specialty.

Q. Do you have a specialty as a law enforcement officer?

A. Yes, sir.

Q. What is that specialty?

A. Alcohol, tobacco, firearms and explosives.

Q. One of your specialities is dynamite, is it not—explosives?

A. Under the explosives area, yes, sir.

Q. Is dynamite an explosive?

A. Yes, sir.

Q. You were brought to 2816 Parker Street at whose request?

A. I don't recall.

Q. Did you go to the NCCF headquarters on North 24th Street on August 22, 1970?

A. Yes, sir.

Q. At whose request?

A. Here again I don't recall any specific request having been made. We were there in my opinion on an assistance capacity and, you know, to help wherever there may be (Page 92) some help needed, and so forth. If we were under any direction or orders it would be under the Omaha Police Department.

Q. Did you participate in that briefing session at 4 o'clock in the afternoon on the 22nd?

A. Yes, sir, I did.

Q. Wasn't the concern and the emphasis at that time to seize and locate the dynamite?

A. I do remember it being mentioned. I think it was one of the concerns, yes.

Q. As a matter of fact didn't Lieutenant Swanson, then Sergeant Swanson, tell you that his concern was where was the dynamite or his concern about the location of the dynamite?

A. I don't recall anything by Sergeant Swanson at the time; no, sir.

Q. When you went into 2816 Parker Street did you know there was a cubbyhole, a lean-to type position of a door in the basement of the crawl space? Did you know of it beforehand?

A. No, sir.

Q. Did any of the officers mention to you that it was there?

A. Not that I recall.

Q. Did any of the officers ever say they had ever been to 2816 Parker Street prior to the time of your entry (Page 93) on August 22, 1970?

A. I don't recall them mentioning it; no, sir.

Q. When you were in the vicinity of 2816 Parker Street you actually made two trips to 2816 Parker Street, didn't you? Or were you part of the constabulary officers who were there waiting for Sergeant Swanson and Sergeant Pfeffer to return?

A. I was there only one time.

Q. Did you see Sergeant Pfeffer and Sergeant Swanson leave while you were present at 2816 Parker?

A. I cannot recall, sir.

Q. Do you recall whether or not anybody mentioned to you that Duane Peak was in that house at 2816 Parker Street during the afternoon of 8/22/70?

A. No, sir; I do not remember.

Q. Do you recall how the officers entered into 2816 Parker Street? Did some go in through the front door and some go in through the back door?

A. I recall the portion of where I was. That would be all I would be able to recall.

Q. Did you possess a firearm at that particular time?

A. Yes, sir.

Q. When you went into the premises was your firearm drawn?

A. As I recall it was; yes, sir.

Q. Were the other officers' firearms drawn?

(Page 94) A. It seems to me they were.

Q. Where did you go when you entered into the premises? Did you go directly to the basement?

A. Very shortly after entry I went to the basement, yes, sir.

Q. Now you were not attached to nor were you assigned to the Omaha Police Department, were you?

A. No, sir.

Q. You were more back-up or auxiliary help, were you not?

A. Yes, sir.

Q. And it was nt your duty at that time to arrest Duane Peak, was it?

A. Not specifically.

Q. You didn't feel as though it was your duty? You were there to help the police officers with your expertise in alcohol, tobacco and firearms, isn't that correct?

A. Yes, sir; that is basically true.

Q. How long had you been at the 2816 Parker residence before you entered? Can you compute for us the time of your arrival and the time of your entry?

A. Sir, I have no recollection regarding the time of arrival. I know it was dark, in the later part of the evening; but as I recall, almost immediately upon arriving after getting out of the cars, going up to the house there at 2816 Parker, and going to the rear of (Page 95) the house, and the entry was made almost—

Q. Simultaneously?

A. Yes, sir. I don't recall any delays or anything.

Mr. Herzog: I think that is all.

Mr. Kammerlohr: I have no further questions, your Honor.

The Court: All right. You may stand down.

Mr. Curd: Your Honor, I would like to correct one thing.

The Court: Yes, you may.

Mr. Curd: I think I said earlier I had been employed about 18 months at that time. That should be about a year.

The Court: About a year?

Mr. Curd: Yes.

The Court: All right. Now anything further, Mr. Herzog?

Mr. Herzog: No, your Honor.

The Court: Mr. Kammerlohr?

Mr. Kammerlohr: No, your Honor.

The Court: You may stand down, Mr. Curd.

Mr. Kammerlohr: Your Honor, I have some other officers present but I believe their testimony would be cumulative only and unless the Court (Page 96) desires that I call them, I think the State would be willing to rest.

The Court: Very well.

Mr. Herzog: Your Honor, the State's representative and respondent's counsel has called two witnesses that I subpoenaed pursuant to the Court's order. They would have been my witnesses had I proceeded, so I have no evidence to offer and so we would conclude our portion of the hearing.

(Page 97) CERTIFICATE OF REPORTER

I, Joseph L. Pasquale, Official U. S. Reporter District of Nebraska, certify that the proceedings of the within-titled case was reported by me in shorthand at the time and place heretofore stated;

that the foregoing transcript is a true and correct record of the proceedings had, transcribed by me.

/s/ Joseph L. Pasquale

Official U. S. Reporter

Lincoln, Nebraska

RECEIVED
APR 28 1975
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

DAVID L. HERZOG,
1431 First National Center
Omaha, Nebraska 68102

J. PATRICK GREEN,
707 City National Bank Bldg.
Omaha, Nebraska 68102

Attorneys for Respondent.

9

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions and Statutes Involved	2
Statement of the Case	3
Argument	13
I THE STATE DOES NOT CONTEST THAT THE COURTS BELOW PROPERLY APPLIED THE EXCLUSIONARY RULE IN THIS CASE. RATHER, IT SEEKS MODIFICATION OF THE RULE. HOWEVER, THE CHANGES IN THE RULE WHICH IT SEEKS HAVE NO RELEVANCE TO THE ACTUAL FACTS OF THIS CASE. NONE OF THE PROPOSED MODIFICATIONS OF THE EXCLUSIONARY RULE WOULD SAVE THE SEARCH HERE. IN ANY EVENT, THE PROPOSED MODIFICATIONS WOULD SUBSTANTIALLY THWART THE OPERATION OF THE EXCLUSIONARY RULE. SINCE THE CORRECTNESS OF THE DECISIONS BELOW IS NOT CONTESTED, AND SINCE THE FACTS OF THIS CASE DO NOT SUPPORT THE MODIFICATIONS OF THE EXCLUSIONARY RULE WHICH THE STATE SEEKS, THE WRIT SHOULD BE DENIED.	13
A. TO ALLOW SUPPLEMENTATION OF A DEFECTIVE AFFIDAVIT FOR A SEARCH WARRANT AT A SUBSEQUENT HEARING ON A MOTION TO SUPPRESS WOULD AMOUNT TO AN ELISION OF THE WARRANT CLAUSE FROM THE FOURTH AMENDMENT. IN ANY EVENT, THE ADDITIONAL INFORMATION UPON WHICH THE STATE RELIES DOES NOT ESTABLISH PROBABLE CAUSE.	20
B. TO MAKE THE OPERATION OF THE EXCLUSIONARY RULE DEPEND ON THE SUBJECTIVE MIND STATE OF THE POLICE OFFICERS, AS THE STATE REQUESTS, WOULD RENDER THE EXCLUSIONARY RULE MEANINGLESS. IN ANY EVENT, THE EVIDENCE HERE DEMONSTRATES THAT THE POLICE DID NOT ACT IN SUBJECTIVE GOOD FAITH.	26
C. THE STATE'S REASONABLENESS TEST AS AN ALTERNATIVE TO THE REQUIREMENT OF PROBABLE CAUSE WOULD RELIEVE THE POLICE OF THE NECESSITY OF JUSTIFYING AN ENTRANCE ONTO PREMISES, AND, THUS, WOULD TOTALLY EVISCERATE THE PROTECTION OF PRIVACY PROVIDED BY THE EXCLUSIONARY RULE. IN ANY EVENT, THE STATE'S ARGUMENT THAT THE POLICE SEARCH HERE WAS REASONABLE HAS NO BASIS IN FACT.	33
II THE COURTS BELOW CORRECTLY HELD THAT RICE EXHAUSTED HIS STATE REMEDIES ON THE ISSUES OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK.	38
Conclusion	41

CITATIONS

CASES:

Bivens v. 6 Unknown Federal Narcotics Agents, 403 U.S. 388, 420-421 (1971)	18
Brinegar v. United States, 338 U.S. 160 (1949)	25
Carroll v. United States, 267 U.S. 132,	34
Coolidge v. New Hampshire, 403 U.S. 443 (1971)	20A
Fay v. Noia, 372 U.S. 391, 435 (1963)	40
Francisco v. Gathright, ___ U.S. ___, 42 L.Ed.2d 226, (1974)	40
Hester v. United States, 265 U.S. 57 (1924)	21, 33
Humphrey v. Cady, 405 U.S. 504, 516 (1972)	39, 40

Johnson v. New Jersey, 384 U.S. 719 (1966) 27

Katz v. United States, 389 U.S. 347,357 20, 33

Lankford v. Gelston, 364 F.2d 197 (4th Cir.) 1966) 32

Mancusi v. DeForte, 392 U.S. 364, (1968) 33

Michigan v. Tucker, ___ U.S. ___ (1974) 26, 27

Miranda v. Arizona, 384 U.S. 436 (1966) 27

Picard v. Conner, 404 U.S. 270 (1971) 39

Roaden v. Kentucky, 413 U.S. 496 (1973) 20A

Roberts v. Lavallee, 389 U.S. 40 (1967) 40

Sanders v. United States, 373 U.S. 1 (1963) 39

Sgro v. United States, 287 U.S. 206 (1932) 23

Spinelli v. United States, 393 U.S. 410 (1969) 20A

State v. Dussault, 193 Neb. 122, 225 N.W.2d 558 (1975) 21

State v. Rice, 199 N.W.2d 488, 188 Neb. 739 (1972) 3, 21

Terry v. Ohio, 192 U.S. 20-22 34, 37

United States v. Calandra, 414 U.S. 338 (1974) 26, 27

United States v. Dorman, 435 F.2nd 385 (D.C.Cir. 1969) 21

United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974) 21

United States v. Shye, 492 F.2nd 886 (6th Cir. 1964) 21

United States v. United States District Court, 407 U.S. 297 (1972) 20a,21

Government of Virgin Islands v. Gereau, 502 F.2nd 914 (3rd Cir. 1974) 21

Warden v. Hayden, 387 U.S. 294 (1967) 33

Whitley v. Warden, 401 U.S. 560 (1971) 20A

Wilwording v. Swenson, 404 U.S. 249 (1971) 39

Wyman v. James, 400 U.S. 309 (1971) 17

Yates v. United States, 354 U.S. 298 (1957) 24

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
EIGHTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions of the District Court (App. II of the Petition) are not yet officially reported. The opinion of the Court of Appeals (App. I of Petition) is not yet officially reported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Where the police searched residential premises pursuant to a search warrant issued on an affidavit which did not show probable cause, may the suppression remedy be withheld because of additional police information introduced at the suppression hearing which is merely cumulative of the contents of the affidavit already held to be defective?

2. May the suppression remedy be denied on the grounds that police were acting in good faith in making the search, even though they acted in contravention of Constitutional standards, in a case where they had no probable cause to believe that seizables were on premises, where no emergency situation existed requiring immediate action, and where the testimony of the police officers demonstrates that in making the search they acted on nothing more than a hunch?

3. May the suppression remedy be withheld on the grounds that a search was reasonable in a case where police entered and searched residential premises with a defective affidavit, without probable cause to believe that a seizable was on the premises, and where no emergency situation existed where life or property was threatened?

4. Where the Supreme Court of a state has held that a search was lawful because the warrant pursuant to which it was conducted was validly issued, should a United States District Court having found the warrant invalid remit a petitioner for habeas corpus to the state courts to litigate the validity of alternative justifications of the search already presented to the State Supreme Court but not decided by it?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent Constitutional provisions and statutes are contained in the Petition at pages 4 - 8.

STATEMENT OF THE CASE

Respondent Rice is at present detained at the Nebraska Penal and Correctional Complex where the petitioner is the warden. He is there pursuant to a jury verdict of guilty and judgment and sentence to a term of life imprisonment pronounced upon him by the District Court of Douglas County, Nebraska on April 17, 1971. The jury found Rice guilty of the crime of first degree murder. The killing involved was the killing of Larry D. Minard, Sr., a member of the Omaha Police Department. Minard was killed on August 17, 1970, while making a police call. While on the premises where the call was being investigated, he was killed when a bomb exploded. The conviction of Rice was affirmed by the Supreme Court of the State of Nebraska on July 14, 1972 in an opinion reported at 188 Neb. 728, 199 N.W.2d 480 (1972).

After Rice's conviction was sustained in the state courts, he sought habeas corpus in the United States District Court for the District of Nebraska. Rice's attack on his conviction as constitutionally improper was bottomed on a claim that the products of two unconstitutional searches were admitted in evidence against him. The first search involved the search and seizure at his residence at 2816 Parker Street in Omaha, Nebraska on August 2, 1970. The second search involved the seizure and subsequent chemical

examination of his clothing conducted on and after August 27, 1970, the date upon which he was arrested. Ultimately, the United States District Court accepted Rice's argument and granted the writ, directing his release unless he be tried within 90 days after the order became final and no longer subject to review. On the State's appeal, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court.

The search and seizure issue arose in the following way. Minard, and other police officers who accompanied him, had gone to a home in Omaha as a result of a call on the police emergency number which reported a woman screaming at a residence at 2865 Ohio Street in Omaha. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Sometime after the initial entry, Minard approached the suitcase and while he inspected it it exploded, killing him.

The police immediately began an investigation of the crime. After a time, they obtained evidence that Duane Peak, a member of the National Committee to Combat Fascism, a political organization known in the community as the Black Panthers, had been involved in the crime. Specifically, they received information that it was Peak

who had made the call regarding the disturbance. They also obtained evidence that Peak had sometime prior to the murder been seen with a suitcase similar to the one used.

The police also had information that Edward Poindexter, another officer of the NCCF, was capable of rigging a booby trapped bomb.

The police intelligence squad was familiar with the operations of the NCCF. For some time prior to the death of Minard they had developed a file on this organization. The file included publications of the NCCF, some of which contained articles by Poindexter or by Rice advocating violence against the police.

On Saturday afternoon, August 22, arrest warrants were issued for Peak and Poindexter. The Omaha police began a search for the two suspects.

The police constructed a list of different places where they thought Peak might be. The first of these places was the headquarters of the NCCF. A large number of officers converged there and searched those premises. An arrest was made at those premises. After the officers who made the search and arrest at the headquarters returned to the police station, they were subdivided into smaller parties and were instructed by Lt.

Perry to "proceed with their previously assigned houses." (Federal Court Transcript, Perry testimony, pages 78-79). As Lt. Swanson, another officer, describes the instructions that were given, they were ordered "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (Federal Court Transcript, page 32).

The police had knowledge that Duane Peak, who they were seeking, was a member of the NCCF. Rice was also a member of that organization and one of its officers. His house had been a periodic meeting place for NCCF members. Peak was one of the members of the organization who had visited at Rice's house. The officers therefore went to Rice's house at 2816 Parker Street in search for Peak. At the time police arrived at Rice's house, Poindexter, the other party for whom they had an arrest warrant, had already been under arrest for several hours.

At 10:30 the police arrived at Rice's home. They found the lights and the television on, but received no response to a knock at the door. The leaders of the police team, Lt. (then Sgt.) Swanson and Lt. (then Sgt.) Pfeffer decided not to forcibly enter the house. Rather they decided to obtain a search warrant for Rice's home. As Lt. Swanson explained:

"Well one thing that had been troubling me all day, since the search of the Black Panther Headquarters, is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'why don't we check this house for Duane Peak and we may find some dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (Federal Court Transcript, page 42).

The two command officers then returned to the police station, where they prepared an affidavit for a search warrant. The affidavit consisted of three allegations. The first two, which rested upon the knowledge of the officers, were that:

"1. David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.

"2. A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCF."

The third averment was based upon hearsay, it was that:

"We have been told in the past that Rice keeps explosives at his residence, and also illegal weapons, which he has said should be used against police officers."

The tip, alleged in the affidavit, had been received by the police at least several weeks, and possibly several months, before the application for the search warrant. This fact, however, was not revealed to the magistrate. The tip was much less positive than the affidavit indicated. As Lt. Swanson testified in state court, "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that they might store it."

In addition to the information contained in the affidavit, the police had certain other information, which they introduced in the state court suppression hearing. This information is summarized by the Supreme Court of Nebraska in its opinion at 188 Neb. 738-739, 199 N.W.2d 487-488. It consisted of the following:

"It is worthy of mention that in connection with the search for explosives and devices at 2815 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a statement to the police. This

directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters 'to lay low.' (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, ' . . . the action was a week late.' The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and delined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing 'directions on how to make bombs'."

After obtaining the search warrant, at about 11:30, the two police officers returned to Rice's home and an entrance was made. In a box in the basement, the police found 14 sticks of dynamite. They also found blasting caps, wiring, battery, and a pair of long-nosed pliers.

Peak was subsequently arrested, and on August 27, Rice voluntarily surrendered himself. Rice was placed under arrest for unlawful possession of an explosive substance. His arrest was based solely upon the items seized by the police at 2816 Parker Street on August 22, 1970.

The clothing Rice was wearing at the time of his arrest was seized by the police and subject to chemical analysis for dynamite particles. Such particles were found.

In the state courts, Rice sought suppression of the evidence at 2816 Parker Street and the results of the examination of his clothing as fruits of that search. His principal contention was that the affidavit upon which the warrant was based was fatally defective. The State introduced evidence to supplement the allegations of the affidavit. In addition, it sought to justify the search on the grounds of the existence of exigent circumstances and because of police possession of the warrant for Peak. Both the Nebraska trial court and the Supreme Court found the affidavit sufficient. However, the Nebraska Supreme Court alternatively held that the allegations of the affidavit could be supplemented by additional evidence, and that the additional evidence demonstrated probable cause.

In the federal habeas corpus proceeding, the District Court in an opinion filed March 30, 1974, held that the affidavit was fatally defective and did not demonstrate probable cause. The Court also held that the affidavit could not be supplemented with the additional information introduced in the state suppression proceeding in order to make out a case of probable cause.

The State had made little or no effort to support its exigent circumstances and arrest warrant justifications for the search. The District Court offered the State an opportunity to so supplement the record.

The State's evidence in the District Court was primarily devoted to the question of whether or not the police had probable cause to believe that Peak was at Rice's house when they went there. The police testimony demonstrated that there was no cause to believe that Peak was at Rice's house. They had no reports of Peak being at Rice's house. He had not been seen in the vicinity of Rice's house. The only basis for seeking him there was that he was a member of an organization to which Rice belonged.

After the supplemental hearing the District Court held that the State had not demonstrated that the police had probable cause to believe that Peak was in Rice's house when they made their entrance. The District Court also held that no exigent circumstances existed which would have justified the police search without a warrant and that, in any event, the police had no probable cause to believe that any seizable was in the house at 2816 Parker Street when they made their entrance.

The Court of Appeals affirmed the District Court decision on all of the issues raised.

In the net then, the facts of this case were that the police had no evidence indicating that Rice was involved in the killing of Minard at the time his house was searched. They did have evidence that he was a member of the RCCF and one of its officers. They had evidence that he might have made statements threatening to police officers. They had evidence that two other members of the organization were involved in the killing. They had a stale tip that dynamite might be on Rice's premises, which tip was totally uncorroborated. They had no information that Peak was at Rice's house. No emergency existed, as is demonstrated by the fact that the police delayed for one hour before making entrance into Rice's house, and during that hour took no steps to protect the neighborhood. Yet though there was no emergency, though there was no evidence of Rice's involvement in any crime, though there was no probable cause to believe that either a seizable person or seizable things were within Rice's home, the police made entrance into his home and proceeded to search it. Because of the total want of any preexisting justification for entrance into Rice's home, the District Court and the Court of Appeals found

that entrance unlawful and Rice's trial constitutionally infirm because the things found within the house and the fruits of those things had been admitted against him in his state court trial.

ARGUMENT

I

THE STATE DOES NOT CONTEST THAT THE COURTS BELOW PROPERLY APPLIED THE EXCLUSIONARY RULE IN THIS CASE. RATHER, IT SEEKS MODIFICATION OF THE RULE. HOWEVER, THE CHANGES IN THE RULE WHICH IT SEEKS HAVE NO RELEVANCE TO THE ACTUAL FACTS OF THIS CASE. NONE OF THE PROPOSED MODIFICATIONS OF THE EXCLUSIONARY RULE WOULD SAVE THE SEARCH HERE. IN ANY EVENT, THE PROPOSED MODIFICATIONS WOULD SUBSTANTIALLY THWART THE OPERATION OF THE EXCLUSIONARY RULE. SINCE THE CORRECTNESS OF THE DECISIONS BELOW IS NOT CONTESTED, AND SINCE THE FACTS OF THIS CASE DO NOT SUPPORT THE MODIFICATIONS OF THE EXCLUSIONARY RULE WHICH THE STATE SEEKS, THE WRIT SHOULD BE DENIED.

The District Court and the Court of Appeals held that the affidavit upon which the search warrant for Rice's premises was issued did not show probable cause. The State does not contest those holdings. The District Court and the Court of Appeals held that the police did not have probable cause to believe that Duane Peak for whom they had an arrest warrant was concealed on Rice's premises. The State does not contest those holdings. The District Court and the Court of Appeals held that the police did not have information independent of the affidavit for the

search which demonstrated probable cause to believe contraband was hidden on Rice's premises. The State does not contest those holdings. The District Court and the Court of Appeals held that no emergency situation existed which might have justified police action otherwise in contravention of constitutional standards. The State does not contest those holdings.[1]

1. The State's argument is that if the Exclusionary Rule is not modified in this case a murderer will be released. What was found on Rice's premises and in his clothing was dynamite and dynamite particles. The possession of dynamite alone does not prove murder. If the State's argument that suppression here will secure Rice's release is correct, it is because the State did not have an adequate first degree murder case.

The actualities of the State's case are different than its brief suggests. Rice was convicted upon the testimony of Duane Peak, the youth who actually planted the bomb. The evidence suppressed here was used to corroborate his testimony that Rice had aided in the construction of the bomb and had retained it in his home until it was taken for use.

The case turned upon the credit which the jury gave to Peak's testimony v. Rice's testimony denying involvement. Peak's story about Rice was not consistently told. Other witnesses contested some of its details. Peak's testimony was procured by the State under circumstances suggestive of a deal. Subsequent to the conviction of Rice, Peak was processed as a juvenile delinquent rather than a felon.

Thus, the State is not deprived of the opportunity to retry Rice by the application of the exclusionary rule. On the other hand, the State's case is not so overwhelming as to make a second jury verdict a foregone conclusion. Rather, a second trial would take place in a context less emotionally than the first. Thus, no miscarriage of justice results from the application of the Exclusionary Rule in this case.

The decisions of the courts below involved a straight-forward application of existing learning under the Exclusionary Rule. The correctness of those decisions under present law is not contested. Rather, the State of Nebraska argues that this case presents the Court with an appropriate vehicle for modification of the Exclusionary Rule. It suggests three possible modifications of the Rule which it believes would save its evidence here from suppression.

The three modifications which Nebraska suggests in order to save its case are that:

1. The Exclusionary Rule should be modified to allow the admission of evidence seized under a warrant issued upon a defective affidavit, if the police officers who executed the warrant had information not contained in the affidavit which showed probable cause to search;

2. That evidence should not be suppressed if the police officers who seized it acted in subjective good faith, even though they may have violated Constitutional standards, or in other words, that suppression should be made contingent upon an intent by police officers to violate the Constitution; and

3. That if a search is conducted in a reasonable manner, even though police officers did not have cause to

believe that seizables were on premises when they made entry, evidence found on the premises should not be suppressed.

The gravest difficulty with each of the State's proposed modifications of the Exclusionary Rule, as we will demonstrate, is that the facts of this case do not come within any of the proposed exceptions. Moreover, each of the proposed exceptions would substantially emasculate the Exclusionary Rule.

This case must be viewed in the context of a continuing need for the Exclusionary Rule. Nebraska asks for its modification, not its abolition. Moreover, the State points to no effective alternative remedy which could perform the task now assigned the Exclusionary Rule, that is deterring invasions of the Fourth Amendment protected right of privacy. The modifications Nebraska requests must be evaluated in the context for continuing the Exclusionary Rule. Would the modifications advance or hinder the performance of the task still assigned to the Exclusionary Rule? We believe that an examination of the proposed modifications will demonstrate that they would substantially thwart the Exclusionary Rule.

The State prefaces its argument in support of its proposed modifications of the Rule with a wide-ranging attack on the merits of the Exclusionary Rule. Since it

does not request abolition of the Rule, we do not reply in detail to its assault on the Exclusionary Rule. Nevertheless, we briefly reply to the State's argument insofar as it is relevant to the merits of the State's case for modification of the Rule.

The State's attack on the Exclusionary Rule contains two flaws. The first is the failure of the State to come to grips with the importance of Fourth Amendment rights. It is easy to denigrate the Exclusionary Rule by focusing solely on the social costs of retaining it, while ignoring the value of the rights it protects. The second flaw in the State's argument is related to the first. Unless the privacy which the Fourth Amendment protects is deemed without value, it must be protected against invasion. Currently the only effective remedy for violation of Fourth Amendment rights is suppression of evidence. Without the Exclusionary Rule, Fourth Amendment rights become rights without remedies. Rights without remedies are not rights at all.

This case involves an invasion of a private home. The sanctity of the home lies at the root of the values the Fourth Amendment protects. Wyman v. James, 400 U. S. 309, 316-317 (1971). The Amendment protects privacy.

The home is a man's private place. Its boundaries define a sphere of influence within which a person may be himself and express himself secure from the intrusion of the uninvited. In a predominately urban society, the propinquity of others forces on all the character of public person. Opportunity to retreat from public roles and rest from public performance is a necessity of meaningful existence in such a world. The opportunity to retreat and rest depends on the sense that the home is a bounded sanctuary. In applying the Exclusionary Rule to condemn an unwarranted invasion of a home, and hopefully to deter future invasions, the courts below defended the core of the the privacy that the Fourth Amendment protects.

This brings us to our second point. Whatever the merits or demerits of the exclusionary rule, it is the sole protector of Fourth Amendment rights. Its abolition prior to the creation of a new guardian creates two intolerable dangers. Firstly, as the Chief Justice observed in his dissenting opinion in Bivens v. 6 Unknown Federal Narcotics Agents, 403 U.S. 388, 420-421 (1971):

> ". . . In a sense our legal system has become the captive of its own creation. To overrule Weaks and Map, even assuming the Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain

the impression, however erroneous, that all constitutional restraints on police had somehow been removed--that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."

The second danger is related to the first. The exclusionary rule is unpopular with the public. Yet, that unpopularity paradoxically is an expression of public faith in the values the Fourth Amendment protects. In a large measure, the public call for "law and order" reflects a fear that people are no longer safe in their own homes. While abolition of the Exclusionary Rule might aid in quieting these fears, abolition without appropriate alternative could replace the fear of intrusion of the wrongdoer by fear of unwarranted intrusion of the police. When the home is no longer perceived as a sanctuary, it is no longer a home.[2]

2. The State suggests that the abolition of the doctrine of sovereign immunity in Nebraska by the Political Subdivision's Torts Claims Act, Sec. 23-2401, et seq., Neb. R.R.S. and the State Tort Claims Act, Sec. 81-8,209, et seq., Neb. R.R.S. provides an alternative remedy. However, it is far from clear that the statute would reach police conduct offensive to the Fourth Amendment. Both acts exclude liability where a discretionary function is involved and both preclude liability for assault, battery, false arrest, false imprisonment, malicious prosecution, and abuse of process. Sec. 23-2409 (2) (5) and Sec. 81-8,219 (1) (a) (d). Nebraska should be required to present the Court with a working alternative to the exclusionary rule before it requests permission to be freed of its strictures.

A. TO ALLOW SUPPLEMENTATION OF A DEFECTIVE AFFIDAVIT FOR A SEARCH WARRANT AT A SUBSEQUENT HEARING ON A MOTION TO SUPPRESS WOULD AMOUNT TO AN ELISION OF THE WARRANT CLAUSE FROM THE FOURTH AMENDMENT. IN ANY EVENT, THE ADDITIONAL INFORMATION UPON WHICH THE STATE RELIES DOES NOT ESTABLISH PROBABLE CAUSE.

The State argues that the Exclusionary Rule should be modified to allow the police to supplement a defective affidavit for a search warrant at the hearing on the motion to suppress. The State's argument suffers from two fundamental vices. Firstly, the State completely ignores the warrant clause of the Fourth Amendment, and hence the central role which the magistrate plays in the protection of Fourth Amendment rights. Secondly, the State's position is that such a modification of the Exclusionary Rule would save the search here. That premise is factually incorrect. The additional information produced in the state court hearing on the motion to suppress does not demonstrate the existance of probable cause to believe that dynamite was on the premises at 2816 Parker.

(1)

"Searches conducted outside the judicial process without prior approval by the judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established well delineated exceptions." Katz v. United States, 389 U.S. 347, 357

Unless time is too short for officers to procure a warrant, they are generally required to have a warrant before they may intrude into a constitutionally protected area. Roaden v. Kentucky, 413 U.S. 496, 505 (1973); Coolidge v. New Hampshire, 403, U. S. 443, 462 (1971). Before a magistrate may issue a search warrant, probable cause must be shown to him. Even if the officer applying for the warrant had probable cause, unless he informed the magistrate of that cause, the warrant and ensuing search is invalid. Whitley v. Warden, 401 U.S. 560, 565. fn.8 (1971); Spinelli v. United States, 393 U.S. 410, 413 fn.3 (1969).

The limitation of the suppression hearing to the affidavit for the warrant is a derivative of the requirement of a warrant. The warrant is required in order to assure disinterested review of police information before an invasion of privacy takes place. United States v. United States District Court, 407, U.S. 297, 315-317 (1972). If the magistrate's role is to be meaningful, the justification for the search must be limited to the information presented to him. If that information can be supplemented, the procurement of the warrant becomes mere ritual and the magistrate is reduced from judge to ceremonial figure. The requirement of the warrant derives directly from the second clause of the Fourth Amendment. Thus, the limitation

of the justification to the information presented to the magistrate is bottomed in the Fourth Amendment. The modification of the Exclusionary Rule the State requests amounts to a modification of the Fourth Amendment as this Court recognized in the United States v. United States District Court, supra.[3]

(2)

However, the modification the State seeks would not save its case in any event. The additional information presented in the state court suppression hearing demonstrated

3. The State's argument rests on a confusion between searches and arrests in the original opinion of the Nebraska Supreme Court in this case, State v. Rice, supra 188 Neb. 739, 199 N.W. 2nd 488, which the court later repeated in State v. Dussault, 193 Neb. 122, 225 N.W. 2nd 558 (1975). A warrant is not required for an arrest, and thus, when an arrest is challenged the issue is whether probable cause to arrest existed at the time of arrest, rather than when a warrant was sought. The affidavit is not supplemented, rather the arrest may be validated independently of the warrant. The basis for the distinction between arrests and searches is that an arrest need not invade a constitutionally protected area. When an arrest requires an invasion of a constitutional protected area, an arrest warrant and in some circumstances a search warrant would be required. Then, the limitation of justification to information presented to the magistrate would attach. See United States v. Dorman, 435 F 2nd 385 (DC Cir. 1969); United States v. Shye, 492 F 2nd 886 (6 Cir. 1964); United States v. Phillips, 497, F 2nd 1131 (9 Cir. 1974); Government of Virgin Islands v. Gereau, 502 F 2nd 914 (3rd Cir. 1974). Conversely, if property may be seized without invasion of privacy, the requirement of a warrant does not apply. Hester v. United States, 265 U.S. 57 (1924). Thus, the supposed inconsistency in Fourth Amendment learning that Nebraska seeks to have resolved does not exist.

that the tip on which the police acted was even less substantial than the affidavit indicated. In addition, it demonstrated that the tip was stale. None of the additional facts presented in the suppression hearing went to establish the presence of seizables at Rice's residence.

The District Court had available to it the testimony in the state court. With regard to the additional evidence concerning the tip, a matter to which the Nebraska Supreme Court did not avert, the District Court noted:

> " . . . The source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as 2½ months prior to the entry of Rice's house. Moreover the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to supress in the state criminal trial, Lt. (then Sgt.) Swanson testified as follows concerning the tip: 'I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places they might store it.' "
>
> Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip." (Memorandum and Order of July 5th).

The tip itself was weakened rather than strengthened by the additional evidence. Instead of the positive averment in the affidavit "We have been told in the past that Rice keeps explosives, at his residence . . ." the tip now becomes "David Rice's house would be one of the places they might store it."

The original affidavit for the search warrant did not indicate when the tip had been received. Swanson's testimony at the hearing on the motion to suppress shows that it was at least several weeks, and possibly several months old. After the hearing on the motion to suppress, the tip runs afoul of the rule that in order to justify a finding that property is probably upon the premises to be searched, the information "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." Sgro v. United States, 287 U.S. 206, 210 (1932).

The other information in the hearing on the motion to suppress, which the Nebraska Supreme Court used to buttress the defective affidavit, 188 Neb. 738-739, 199 N.W.2d 487-488, merely supports the accuracy of the averments in the affidavit that:

> "(1) David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> (2) A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCP."

However, these two averments were not rejected by either the District Court or the Court of Appeals. Rather, both Courts held that the averments were insufficient to demonstrate probable cause to believe that dynamite was on Rice's premises or to corroborate the tip. Thus, the Court of Appeals stated:

> "The averments of the affidavit that petitioner was a member of the NCCF and that the NCCF members had already been arrested in the case possibly enhanced the suspicion that petitioner in some way was involved in the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in petitioner's house."

Similarly, the district court held:

> " . . . In Rice's case, the averment that he is a member and minister of information of the NCCF which advocates the violent killing of police, that a policeman had been killed, and that arrests had been made from the membership of the NCCF, in no way suggests that dynamite would probably be stored at the petitioner's house. Perhaps such averments made it more likely that dynamite would be found in Rice's house than the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is Constitutionally protected free speech. Yates v. United States, 354 U.S. 298, 318-319 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not imply that the dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. Brinegar v. United States, 338 U.S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is minister of information. Being minister of information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice is weapons minister or something of that sort, it would heighten the inference down to a particular place. The key failing of the averments, then is that they fail to tie down the storage of dynamite to any particular place. Such particularity is required before a search warrant may issue." (Memorandum and Order of March 29).

The additional information on which the State Supreme Court relied is essentially an elaboration of the basic allegations of the affidavit with regard to Rice's membership in the group and the involvement of members of the group in the killing. It suffers from the same defect as the affidavit itself, that is the failure "to tie down the storage of dynamite to any particular place." If the affidavit could be supplemented as the State requests, the result in this case would not be changed. The additional information which the State pressed upon its own courts, and which the Federal Courts refused to consider, does not demonstrate the probable cause lacking in the affidavit.

B. TO MAKE THE OPERATION OF THE EXCLUSIONARY RULE DEPEND ON THE SUBJECTIVE MIND STATE OF THE POLICE OFFICERS, AS THE STATE REQUESTS, WOULD RENDER THE EXCLUSIONARY RULE MEANINGLESS. IN ANY EVENT, THE EVIDENCE HERE DEMONSTRATES THAT THE POLICE DID NOT ACT IN SUBJECTIVE GOOD FAITH.

The State argues that evidence should not be suppressed though a search was unlawful if the police were proceeding in good faith at the time the search was made. The State does not define the concept of good faith it desires to have applied. However, from the argument it makes, it may be inferred that its notion of good faith encompasses a situation in which the police officer believes that he is acting within the law even though that belief is not reasonable when measured by an objective standard.

(1)

The State purports to find support for this good faith test in Michigan v. Tucker, ___ U. S. ___, 41 L.Ed.2nd 182 (1974); and United States v. Calandra, 414 U.S. 338 (1974). The State's argument rests upon a fundamental misreading of these cases. Both Michigan v. Tucker and United States v. Calandra, bottom the exclusionary rule upon deterance. Obviously, the breach of constitutional rights to be detered is never the one involved in the suppression proceeding. That violation has already taken place. The deterance is aimed at the subsequent conduct of the officers involved in the proceeding and the the conduct of other officers.

A good faith standard is antithetical to this deterance purpose. Under the State's standard, an officer who never bothered to find out that the Fourth Amendment existed could never violate it. Beyond that, when the subjective mind state of the officer becomes the test, he is encouraged to act in contravention of objective standards in the hope he can pursuade a judge he thought he was doing right. Thus, the State's good faith test defeats the purpose of exclusion announced in the authorities upon which it relies.[4]

(2)

The State's argument for the application of a good faith standard in this case is destroyed by the testimony of the police officers in the federal habeas proceeding.

4. The State's argument totally misconstrues the two cases. Calandra dealt with the added deterance value of preventing use of evidence in a grand jury proceeding, which could not be used at trial. Michigan v. Tucker, dealt with the suppression of fruits of a confession itself inadmissable. Neither case purports to indicate objective standards may be departed from when the immediate fruits of a wrongful invasion of privacy are the object of the suppression proceedings.

Further, the "good faith" referred to in Michigan v. Tucker, was objective good faith. The officers had complied with existing case law. After the confession had been obtained, Miranda v. Arizona, 384 U.S. 436 (1966) was decided, but under the holding of Johnson v. New Jersey, 384 U.S. 719 (1966), Tucker's confession fell within the retroactive reach of Miranda. The obvious point, which Michigan v. Tucker makes, that deterance is not served by retroactive change of rule cannot be transmutted into the unsound proposition that objective standards are inconsistent with deterance.

The officers did not entertain a belief that dynamite would be found on Rice's premises or that Duane Peak was secreting himself there. The police did not expect to find either dynamite or Peak at Rice's house. All they had was a hope.

Lt. Swanson, the officer who obtained the search warrant, testified:

> "Well, one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (Federal Court transcript, p. 42).

Swanson's testimony provides a total answer to the application of any good faith exception insofar as the presence of dynamite on the premises was involved. In obtaining and executing the warrant, Swanson was not operating on a strong, subjective belief that he was complying with Constitutional requirements. Rather, he was trying to cover his case. He had no real belief that dynamite was on the premises. However, if he got lucky and found dynamite, he wanted to be able to use it as evidence.

The situation concerning the expectancy that Peak would be found on the premises is identical. Lt. Swanson gives a full explanation of what brought the police to the residence at 2816 Parker Street. He testified that the police had knowledge that Peak, whom they were seeking, was a member of the NCCF. Rice was also a member of that organization. His house had been a periodic meeting place for NCCF members (Federal Court transcript, pages 6-7). Peak was one of the members of that organization who had visited at Rice's house. (Federal Court transcript, page 21).

The police had constructed a list of different places where Peak might be. As Lt. Swanson testifies:

> "At that time we had a list of houses as possibilities, plus getting new addresses from informants . . ." (Federal Court transcript, pages 38-39).

After the search of the NCCF headquarters, the large number of officers who had converged there were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (Federal Court transcript, pages 78-79). As Lt. Swanson described the instructions, there were orders "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (Federal Court transcript, page 32).

The police testimony makes it clear that they did not believe that Peak was at 2816 Parker. Rather, they were conducting searches of a large number of places in the hope that they might find Peak. Thus, Lt. Swanson testifies:

> "Question. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?
>
> Answer. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be." (Federal Court transcript, page 43).

He was specifically queried about information that Peak might have been in Rice's house within the last few days before entry. He testified that:

> "Question: At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?
>
> Answer. I can't recall.
>
> Question. Now, was there anything that you now can recall to tie Duane Peak to the Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of the NCCF, that Peak had been known to go to that house for meetings and otherwise? Now anything else?
>
> Answer. No that was about the information we had." (Federal Court transcript, page 44).

Similarly, both Lt. Pfeffer and Lt. Perry, the other command officers who testified in Federal Court, had no specific information that Peak might be at Rice's house. (Federal Court transcript, pages 71-73; pages 82-83).

Lt. Swanson's testimony demonstrates that the police did not believe that Peak was at Rice's premises. If anyone would have had information linking Peak with those premises, it would have been Swanson, who commanded the intelligence unit. It is clear from Pfeffer's testimony that he had no specific information about a relationship between Peak and Rice, but was merely relying on information provided by the intelligence division. Lt. Perry had seen Peak and Rice together, but that was six months before the event in question, when he served in the intelligence division. (Federal Court transcript, page 83).

The police testimony shows that other probable hiding places of Duane Peak had not been eliminated when Rice's house was searched. Only three prior searches are mentioned. The search of the NCCF headquarters, the search of the home of one of Peak's uncles and a search of Poindexter's home. There is no evidence the police were working through a list of places on the basis of an order of probability. The police did not know where Peak was. They knew he must be someplace. Their strategy was to search everyplace.

On the basis of the foregoing testimony, the Court of Appeals noted that:

> " . . . . The testimony of the various police officers at the evidentiary hearing held before the District Court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that they were acting on nothing more than a hunch or random guess. . . "

Again with regard to the search for dynamite the Court of Appeals states:

> " . . . . Moreover, testimony before Judge Urbom suggests that the purpose of searching for the explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered the dynamite in any of the other locations they had searched earlier in the day." (Emphasis supplied).

The Court of Appeals hald that the State's good faith argument was not only legally invalid, but factually unsupported.

> "We consider it necessary to point out that the record discloses a widespread search for the suspect Peak and Poindexter which have at least a negligent disregard by the Omaha Police for Constitutional rights of not only petitioner but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct condemned in Lankford v. Gelston, supra. We believe this is an appropriate case for the application of the exclusionary rule."

C. THE STATE'S REASONABLENESS TEST AS AN ALTERNATIVE TO THE REQUIREMENT OF PROBABLE CAUSE WOULD RELIEVE THE POLICE OF THE NECESSITY OF JUSTIFYING AN ENTRANCE ONTO PREMISES, AND, THUS, WOULD TOTALLY EVISCERATE THE PROTECTION OF PRIVACY PROVIDED BY THE EXCLUSIONARY RULE. IN ANY EVENT, THE STATE'S ARGUMENT THAT THE POLICE SEARCH HERE WAS REASONABLE HAS NO BASIS IN FACT.

(1)

The State argues that the Exclusionary Rule should be modified so as to judge police conduct of a search by reasonableness under the circumstances, rather than judging reasonableness solely by possession of probable cause vel non.

The point of this argument surfaces from the State's reliance on Warden v. Hayden, 387 U.S. 294 (1967). The State argues that the search here was no more intrusive than that involved in Warden v. Hayden. Hence, the State asks how can the search be condemned. In the net, the State's argument is that the justification for the entry should be ignored, and that a search should only be condemned if the police conduct after entrance is unreasonable.

To state the argument is to refute it. If privacy is to have protection, the zone of privacy must have boundaries. Within the boundaries there is an "expectation of freedom from government intrusion. Mancusi v. DeForte, 392 U.S. 364, 368 (1968); Katz v. United States, 389 U.S. 347, 351-352 (1967), beyond the zone there is no such expectation. Hester

v. United States, supra. The State's argument, that no standard should be applied to judge whether entrance was proper, and that the sole focus should be on what happens after entrance, completely ignores privacy. Once the entrance is made, the sanctuary has been breached. To preserve privacy the initial entrance must require justification.

While the State does not directly make the argument, perhaps it is arguing that some standard less than probable cause should be required as justification for the entrance. The purpose of a search is to find something. The standard of probable cause allows entrance when it is reasonable to believe that the something being sought is on the premises. Carroll v. United States, 267 U.S. 132, 162 (1925). Separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the first clause upon which the State bottomed its argument. The first clause requires searches to be "reasonable." To search where you cannot reasonably expect to find is irrational. To call the irrational reasonable is contradiction.

In cases applying the reasonableness standard, this Court has held that reasonableness must be determined on the basis of a matrix which weighs the governmental interest in entrance against the invasion which the search (1967); Terry v. Ohio, supra 392 U.S. 20-22. The right

invaded a search is the constitutionally protected right to privacy. If the police have no reasonable expectation of finding something, what interest of the government justifies their entrance? The governmental interest is in the police finding what they seek. That interest would only justify going where they could expect to find it.

(2)

In any event, the State's reasonableness argument is devoid of record support. No special circumstances existed in this case which justify the application of a lesser requirement of that of probable cause.

In the court below, the State sought to justify its reasonableness argument by claiming that the police were acting in an emergency situation out of a fear for life and property. As the Court of Appeals noted, that argument was completely refutted by the actual conduct of the police at the time of the search.

> "The conduct of the police upon arrival at petitioner's home, however, errodes the exigent circumstance argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

> The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandate of the Fourth Amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose for searching for explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.
>
> As for the apprehension that Peak was being killed, the delay of more than an hour before entering the house greatly attenuates the force of this argument."

The warrant issued by the magistrate was not issued upon a showing of probable cause to believe dynamite was on Rice's premises. The police possessed no evidence not contained in the affidavit which directly pointed to the presence of dynamite on Rice's premises. The police had no grounds for believing that Peak was hiding on Rice's premises.

Under the evidence in this case, the State's argument for reasonableness reduces to an argument that police may search premises in a situation where neither life nor property is in danger without grounds for belief that either a seizeable person or a seizable thing is on those premises. If that is the reasonableness test which the State seeks to have applied, then whatever the police do is reasonable.

The search for Peak was founded "on nothing more than a hunch or random guess." The search "for explosives was an afterthought . . . because they had not discovered dynamite in any of the other locations they had searched earlier in the day." If conduct is to be judged reasonable, it must be based on reasons. Those reasons must be sufficient given the occasion on which they are advanced to justify the conduct engaged in. Terry v. Ohio, 392 U.S. 1120-22 (1968). Where no emergency exists, where life is not threatened, where property is not in danger, hunch, conjecture, and afterthought do not justify setting at naught human rights specifically protected by the Constitution. As the district court noted in its opinion:

> ". . . The privacy of one's home and the accountability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent of probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home."

II

THE COURTS BELOW CORRECTLY HELD THAT RICE EXHAUSTED HIS STATE REMEDIES ON THE ISSUES OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK.

Having held that the search at 2816 Parker could not be justified by the search, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by the State for the search. In both the State district court and the Supreme Court of Nebraska, Rice had attacked the validity of the search warrant used to justify the search. In each court, the State defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since both the State trial court and the Supreme Court upheld the validity of the warrant, neither court passed upon the alternative justifications for the search. Nevertheless, the District Court held that the exhaustion requirement of 28 U.S.C. Sec. 2254 had been satisfied on this issue. Its holding was affirmed by the Court of Appeals. These decisions on the exhaustion are clearly correct.

This Court has placed the prerequisite of exhaustion on an alternative double aspect. Petitioner may demonstrate satisfaction of the exhaustion requirement either by showing

that the question he seeks to litigate in the federal habeas proceeding has already been presented to the highest court of the state or by showing that he has no clearly available state remedy. On either of these alternative aspects Rice has satisfied the requirement of exhaustion.

The requirement of exhaustion does not require repetitious applications in the state courts, Humphrey v. Cady, 405 U.S. 504, 516 fn. 18 (1972); Wilwording v. Swenson, 404 U.S. 249, 250 (1971). The test for exhaustion is whether the state courts have been given an opportunity to pass upon the issue, not whether they have in fact passed upon it. Picard v. Conner, 404 U.S. 270, 275 (1971). Once there has been presentation, the requirements of the exhaustion test are met. Humphrey v. Cady, supra, 405 U.S. 516, fn. 18. The presentation requirement is satisfied, even though the claim may not have been directly addressed by the state courts. Sanders v. United States, 373 U.S. 1, 16 (1963).

In this case, the alternative justifications for the search were fully briefed and argued in the Nebraska Supreme Court by both the State and Rice. Those issues were not addressed by the Supreme Court of Nebraska because they became superfluous when that court held the warrant valid. Nevertheless, there was full presentation.

Alternatively, it is clear that at the time he filed his petition for habeas corpus, Rice had no available

state remedy. The exhaustion requirement is to be measured as at the time of the filing of the writ. Fay v. Noia, 372 U.S. 391, 435 (1963); Humphrey v. Cady, 405 U.S. 504, 516 (1972). On the date upon which he filed his application for the writ, there was no way in which the alternative grounds for validating the search could have been litigated in the Nebraska courts. So long as the Nebraska courts held the warrant was valid, the presence or absence of exigent circumstances or the validity or invalidity of the search insofar as it could be supported by the arrest warrant for Peak were irrelevant. Even if there were no exigent circumstances and the search could not be justified because of the possession of the arrest warrant, in Nebraska the search was still valid.

The decision by the district court that the search was invalid opened up a new avenue of relief in the Nebraska state courts, if they chose to accept the District Court's decision. However, since that avenue of relief did not exist at the time of filing, it was not an avenue which Rice needed to pursue. Roberts v. Lavallee, 389 U.S. 40, (1967); Francisco v. Gathright, ___ U.S. ___, 42 L.Ed.2d 226, (1974).

CONCLUSION

The District Court and the Eighth Circuit applied well-settled principles of search and seizure law to condemn the search at 2816 Parker as unlawful. The State has presented no grounds for modification of the principles which the lower courts applied. In any event, the State requests no modification of those principles which would alter the outcome in this case. Suppression of the evidence in this case would be required under any of the State's proposed modifications of the exclusionary rule. The writ of certiorati should be denied.

Respectfully submitted,

DAVID L. HERZOG
1431 First National Center
Omaha, Nebraska 68102

and

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102

Attorneys for Respondent,
David L. Rice.

CERTIFICATE OF SERVICE

I hereby certify that on the 24 day of April, 1975 two copies of the Brief For Respondent In Opposition was mailed postage prepaid, to Paul L. Douglas, Attorney General of Nebraska, 2119 State Capitol, Lincoln, Nebraska 68509, counsel for Petitioner. I further certify that all parties required to be served have been served.

J. PATRICK GREEN
707 City National Bank Bldg.
Omaha, Nebraska 68102

Supreme Court, U. S.
FILED
AUG 11 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONER

PAUL L. DOUGLAS
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska

2115 State Capitol Building
Lincoln, Nebraska 68509
Telephone: (402) 471-2682

Attorneys for Petitioner

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

Pages

Opinions Below 1

Constitutional Provisions and Statutes Involved 2

Questions Presented for Review 9

Statement of the Case 11

Summary of the Argument 17

Argument:

1. The exclusionary rule should be modified in search and seizure cases. 21

2. Should not Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357, prevent exclusion of the evidence in this case. 35

3. Should not "reasonableness" under all the circumstances be the test for a search with a valid arrest warrant? 39

4. May additional facts be presented at the suppression hearing to bolster and validate the original affidavit for a search warrant? 41

5. After the federal district court rules the search warrant was invalid should not it have sent the case back to the state district court for an evidentiary hearing on the question of entry and search without a warrant for exhaustion of that issue? 44

6. Whether the constitutional validity of the entry and search of respondent's premises

INDEX—Continued

Pages

by Omaha police officers under the circumstances of this case where there is no doubt of the guilt of respondent nor any societal interest to be served is a question properly cognizable under 28 U. S. C. § 2254 45

Conclusion 51

CASES CITED

Bivens v. Six Unknown Federal Narcotics Agents, 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999 ..... 21, 30

Case v. Nebraska, 381 U. S. 336, 14 L. Ed. 2d 422, 85 S. Ct. 1486 ..... 47, 48

Coolidge v. New Hampshire, 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971) 28, 42

Draper v. United States, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329 ..... 41, 42

Goham v. Wolff, 471 F. 2d 52 45

Kaufman v. United States, 394 U. S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068 ..... 46, 48

Linkletter v. Walker, 381 U. S. 618, 14 L. Ed. 2d 882, 85 S. Ct. 1731 26

Mapp v. Ohio, 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961) 28

Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) 9, 18, 24, 25, 26, 35, 36, 37, 38

CASES CITED—Continued

Pages

Miranda v. Arizona, 384 U. S. 436 (1966) 36

Olmstead v. United States, 277 U. S. 438, 72 L. Ed. 944 26

People v. DeFore, 242 N. Y. 13 27

Rochin v. California, 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205 31

Schneckloth v. Bustamonte, 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041 ..... 48, 50

Spinelli v. United States, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584 41

State v. Bisaccia, 58 N. J. 586 27

State v. Boykins, 50 N. J. 73 27

State v. Dussault, 193 Neb. 122, — N. W. 2d — 43

State v. Rice, 188 Neb. 728, 199 N. W. 2d 480 16

Thornton v. United States, 368 F. 2d 822 47

United States v. Peltier, — U. S. —, 95 S. Ct. 2313 (June 1975) 24, 26

Warden v. Hayden, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 39

Whitely v. Warden, 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 42

STATUTES CITED

Pages

28 U. S. C. § 1254 (1) 1

28 U. S. C. § 2101 (c) 2

28 U. S. C. § 2254 ..... 4, 10, 11, 45, 46

28 U. S. C. § 2255 46

Neb. Rev. Stat. § 14-101 (Reissue 1974) 7

Neb. Rev. Stat. § 23-2401, et seq. (Reissue 1974) 28

Neb. Rev. Stat. § 26-103 (Reissue 1964) 7, 24

Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Supp. 1974) 8, 9

Neb. Rev. Stat. § 81-8209, et seq. (Reissue 1971) 28

Calif. Civil Rights Act, Cal. Civ. Code, Sections 51 and 52 32

CONSTITUTION CITED

United States Constitution, Amendment IV 3, 27, 28, 31, 33, 34, 36, 37, 39, 40, 51

United States Constitution, Amendment IX 6

United States Constitution, Amendment X 6

United States Constitution, Amendment XIV 2

TEXTS CITED

ALI Model Code of Prearraignment Procedure (May, 1975) 29

TEXTS CITED—Continued

Pages

14 American University L. Rev., No. 1, p. 1 "Who Will Watch the Watchman" 21

37 Univ. Chicago L. Rev. 665 (1970), Oaks, "Studying the Exclusionary Rule in Search and Seizure" 22

76 Harv. L. Rev. 441, Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners" 51

3 Seaton Hall L. Rev. 295, "Practical Prophylaxis and Appellate Methodology: The Exclusionary Rule as a Case Study in the Decisional Process" 27

4 Southwestern Univ. L. Rev. 68, "The Decline of the Exclusionary Rule: An Alternative to Injustice" 32

26 Stan. L. Rev. 1027, Kaplin, "The Limits of the Exclusionary Rule" (May, 1974) 32

'50 Texas L. Rev. 736, "Must the Criminal Go Free if the Constable Blunders?" 25, 27, 28

Wigmore on Evidence, § 2184 (McNaughton Ed., 1961) .. 27

Vol. 58, Judicature Number 2, Aug., 1974, pp. 75, 76 .. 33

In The

Supreme Court of the United States

October Term, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE PETITIONER

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit is reported in 513 F. 2d 1280.

The opinions of the United States District Court of the District of Nebraska are not reported as yet but are contained in Petition for Certiorari App. II, page 58 and page 73.

The jurisdiction of this court is invoked under the authority granted it to review by writ of certiorari to any civil case in the courts of appeals under 28 U. S. C.

§ 1254 (1). The judgments sought to be reviewed were entered by the United States Court of Appeals for the Eighth Circuit on January 28, 1975, petition for rehearing and suggestion for rehearing en banc was denied by said court on February 19, 1975, and the petition for certiorari was filed in this Court on March 27, 1975, within 90 days of the entry of the judgment sought to be reviewed as provided by 28 U. S. C. § 2101 (c).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

(1) Fourteenth Amendment, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

"Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such

male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

"Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

"Section 4. The validity of the public debt of the United States authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

"Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

(2) Fourth Amendment, United States Constitution:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

(3) 28 U. S. C. § 2254:

"(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

"(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

"(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

"(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—

"(1) that the merits of the factual dispute were not resolved in the State court hearing;

"(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

"(3) that the material facts were not adequately developed at the State court hearing;

"(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

"(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

"(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

"(7) that the applicant was otherwise denied due process of law in the State court proceeding;

"(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record:

"And in an evidentiary hearing in the proceeding in the Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a

whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

"(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

"(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding."

(4) Ninth Amendment, United States Constitution:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

(5) Tenth Amendment, United States Constitution:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

(6) Neb. Rev. Stat. § 14-101 (Reissue 1974):

"All cities in this state which shall have attained a population of three hundred thousand inhabitants or more, shall be cities of the metropolitan class and governed by this act. Whenever the words this act occur in sections 14-101 to 14-138, 14-201 to 14-229, 14-360 to 14-376, 14-501 to 14-556, 14-601 to 14-620, 14-701 to 14-708, and 14-801 to 14-816, they shall be construed as referring exclusively to those sections. Each city of the metropolitan class shall be a body corporate and politic and shall have power (1) to sue and be sued, (2) to purchase, lease, lease with option to buy, acquire by gift or devise, and hold real and personal property within or without the limits of the city for the use of the city, and real estate sold for taxes, (3) to sell, exchange, lease, and convey any real or personal estate owned by the city, in such manner and upon such terms as may be to the best interests of the city; *Provided,* that real estate acquired for state armory sites shall be conveyed strictly in the manner provided in sections 18-1001 to 18-1006, (4) to make all contracts and do all other acts in relation to the property and concerns of the city necessary to the exercise of its corporate or administrative powers, and (5) to exercise such other and further powers as may be conferred by law. The powers hereby granted shall be exercised by the mayor and council of such city, as hereinafter set forth, except when otherwise specially provided."

Neb. Rev. Stat. § 26-103 (Reissue 1964):

"No person shall be eligible to the office of judge of the municipal court unless he (1) is thirty years of age, (2) is a citizen of the United States, (3) is a resident of the state for at least three years next preceding his election or appointment, and (4) shall have been regularly admitted as an attorney in this state and remains as an attorney in good standing at the bar thereof."

(7) Neb. Rev. Stat. §§ 29-3001 to 29-3004 (Supp. 1974):

29-3001. "A prisoner in custody under sentence and claiming a right to be released on the ground that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, may file a verified motion at any time in the court which imposed such sentence, stating the grounds relied upon, and asking the court to vacate or set aside the sentence.

"Unless the motion and the files and records of the case show to the satisfaction of the court that the prisoner is entitled to no relief, the court shall cause notice thereof to be served on the county attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that there was such a denial or infringement of the rights of the prisoner as to render the judgment void or voidable under the Constitution of this state or the Constitution of the United States, the court shall vacate and set aside the judgment and shall discharge the prisoner or resentence him or grant a new trial as may appear appropriate. Proceedings under the provisions of sections 29-3001 to 29-3004 shall be civil in nature. Costs shall be taxed as in habeas corpus cases.

"A court may entertain and determine such motion without requiring the production of the prisoner, whether or not a hearing is held. Testimony of the prisoner or other witnesses may be offered by deposition. The court need not entertain a second motion or successive motions for similar relief on behalf of the same prisoner."

29-3002. "An order sustaining or overruling a motion filed under the provisions of sections 29-3001

to 29-3004 shall be deemed to be a final judgment, and an appeal may be taken to the Supreme Court therefrom as provided for in appeals in civil cases; *Provided,* that a prisoner may in the discretion of the Supreme Court upon application to the court be released on such recognizance as the Supreme Court shall fix pending the determination of the appeal."

29-3003. "The remedy provided by sections 29-3001 to 29-3004 is cumulative and is not intended to be concurrent with any other remedy existing in the courts of this state. Any proceeding filed under the provisions of sections 29-3001 to 29-3004 which states facts which if true would constitute grounds for relief under another remedy shall be dismissed without prejudice."

29-3004. "The district court may appoint an attorney or attorneys, not exceeding two, to represent the prisoners in all proceedings under the provisions of sections 29-3001 to 29-3004 and fix their compensation as provided in section 29-1803.03."

—o—

QUESTIONS PRESENTED FOR REVIEW

1. Should the suppression or exclusionary rule be modified to admit relevant, competent evidence obtained under the most exigent circumstances in the exercise of the utmost good faith by the police and courts where use of the rule could serve no deterrent effect or any other valid purpose?

2. Did not this court in *Michigan v. Tucker,* 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974) modify the exclusionary rule in relation to the Fifth Amendment and by implication the Fourth (or if not, should it not),

when its invocation can only punish an innocent error and can have no deterrent or other useful purpose?

3. May it not be reasonable under extremely exigent conditions which portend further bombing, killing and civil disorder for police to enter a known hangout of a youth for whom the police have a valid arrest warrant for allegedly setting a booby trap bomb which killed a police officer, injured others and destroyed a house and at which time the police also have a warrant (later held invalid) to search said known hangout for explosives, when the police do not have probable cause to believe the youth is or is not there at the time of entry?

4. When police are in possession of sufficient facts to obtain a valid search warrant but fail to set forth enough in the affidavit or other evidence before the issuing magistrate, and the warrant issues anyway, may the deficiency be cured by additional probable cause evidence at the suppression hearing?

5. When the state courts find a search warrant valid and thus never consider the validity of the search without a warrant, although presented as an alternative in briefs on direct appeal to the State Supreme Court, shouldn't the Federal District Court send the issues of search without a warrant and probable cause to enter to execute an arrest warrant back to the state trial for exhaustion when said Federal Court finds the search warrant invalid in a Section 28 U. S. C. § 2254 proceeding?

6. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case where there is

no doubt of the guilt of respondent nor any societal interest to be served is a question properly cognizable under 28 U. S. C. § 2254?

STATEMENT OF THE CASE

This is a habeas corpus proceeding under 28 U. S. C. A. § 2254 commenced by respondent Rice in the United States District Court for the District of Nebraska against petitioner, Wolff, Warden, Nebraska Penal and Correctional Complex. The trial court, the Honorable Chief Judge Warren K. Urbom, ruled as follows:

1. That certain evidence admitted at the trial in the state court should have been suppressed for the reason that the affidavit for search warrant under which it was obtained was insufficient.

2. That said evidence should have been suppressed also because the circumstances of the case were not sufficient to authorize the search without a search warrant.

3. That the inspection of Rice's clothing after he was incarcerated was a product of the original illegal search and that evidence thereby obtained should have been suppressed.

The entire state court record was submitted to the Federal District Court by stipulation (see Petition of Certiorari, Appendix II, p. 59, l. 4), therefore, when references herein to Exhibits of state court records are made, it will not be possible to show the page where offered into evidence.

About 2:05 a.m., August 17, 1970, the radio dispatcher at the Omaha, Nebraska, Police Department received a call from a 911 operator indicating that a woman was screaming at 2865 Ohio Street, a vacant house (Pl. Ex. F-3, 193:1-6). He dispatched two patrol cars to said address. Another cruiser subsequently arrived (Pl. Ex. F-3, 211:11-20). The officers entered the house and began looking around. There was a suitcase lying flat in the doorway which blocked the entire doorway and the officers had to step over it to enter (Pl. Ex. F-3, 248:12-20). Officer Minard was directly over the suitcase and it exploded, killing Officer Minard and injuring Officer Tess and demolishing the house (Pl. Ex. F-3, 217:3-13; 241:11-19).

At the hearing on the motion to suppress (Pl. Ex. F-2), Sergeant Swanson testified that during a two year period prior to August 22, 1970, he built a file of newspapers supposedly published by the National Committee to Combat Fascism (Pl. Ex. F-2, 85:8), that a number of these articles bore the signature or the name of Edward Poindexter and David Rice, and a number of these articles were concerned with violence directed toward police officers (Pl. Ex. F-2, 86:1-8), and that defendant David Rice was a member of the N. C. C. F. or the Black Panthers (Pl. Ex. F-2, 88:13), and that he was aware of who the officers of the N. C. C. F. were from his files and periodicals (Pl. Ex. F-2, 89:10) and that in August of 1970 he knew the chairman of the N. C. C. F. was Edward Poindexter and that David Rice was the deputy minister of information (Pl. Ex. F-2, 89:19; 90:6-14). He further knew that Duane Peak was a member of the organization (Pl. Ex. F-2, 90:17).

By Saturday morning, August 22, 1970, a number of people had been interrogated and information from those interrogations began to focus on certain members of the N. C. C. F. (Pl. Ex. F-2, 92:23-93:10).

The voluminous police reports up to that time indicated that a number of witnesses had seen Duane Peak carrying a heavy suitcase on the night of the bombing and that he had warned others to keep away from the suitcase and it was generally identified as a suitcase similar to the one used in the bombing. Also, the voice of the person who called into the police station that a woman was screaming at the place of the bombing was identified as that of Duane Peak. The police reports, by stipulation, were admitted in evidence from the time of the bombing up to and including the night of August 22, 1970 (Pl. Ex. F-2, 182:1-183:9). These police reports are contained in plaintiff's Exhibit I.

On the afternoon of August 22, 1970, arrest warrants were issued for Edward Poindexter and Duane Peak. At about 4:00 or 5:00 p.m. that afternoon a task force of police officers was assembled and dispatched to make an arrest of the two. They first went to the N. C. C. F. headquarters where they made a search and arrested one Cecil and recovered a large amount of ammunition and firearms. The task force took Cecil and the material to police headquarters and then went back looking for Duane Peak and Poindexter, going to Poindexter's house at 3528 North 29th Street and the house of the parents of Frank and Will Peak and finally, being unable to find either Duane Peak or Poindexter, proceeded to the house of David Rice at 2816 Parker Street (Pl. Ex. F-2, 94:7;

95:1; 99:19; A. 35, 39, 42, 43). Prior to this the police had known that Peak had been at the Rice house (A. 44) at 2816 Parker Street. The house where Rice resided was more than a residence. There was a spoked hubcap hanging above the door and directly above that there was a black flag flying day and night; there was a green light burning at night, and in the windows there were posters of known Black Panther figures such as Huey Newton and so on (Pl. Ex. F-3, 208:17-209:5).

On various occasions numerous people stayed at the Rice house. Numerous people and community friends, when they didn't have a place to stay or if there was a party at the house and they didn't want to go home the next day, they stayed at Rice's house (Pl. Ex. F-2, 56: 15-22). Lt. Perry, who was in charge of the investigation, put the Rice house on the list as one of the places to search because he had information that Rice, Poindexter, and Duane Peak were constant companions and that Donald Peak indicated that his brother Duane told him that they were up there at the time they constructed the bomb (A. 74). Officer Pfeffer corroborates this to an extent when he states that they had information from Donald Peak that his brother was involved and also information from the intelligence squad that he had been seen with Rice and also had been in the area (A. 64) and that both Poindexter and Duane Peak frequented Rice's house (A. 26, 27). In addition, at the time the police went to Rice's house they had information that he had planted the bomb in question for the N. C. C. F. (A. 18).

When the task force had been organized that afternoon they were afraid there might be more bombings

and more deaths and that the N. C. C. F. would get to Duane Peak before the police and eliminate him (A. 51, 53). The police were concerned for Duane Peak's safety; they were concerned about protecting the public and themselves from other bombings and booby trap devices and, as a result, had been working nearly around the clock since the original bombing (A. 53, 72).

When they arrived at the Rice house there were lights on and a television set was playing inside the house. The officers knocked at the door and received no response. Officer Swanson and Officer Pfeffer then talked the matter over and decided they should throw a cordon of policemen around the house and the two of them should go and attempt to get a search warrant. They obtained a search warrant and returned in about an hour and proceeded very carefully through the house, looking for Duane Peak. The evidence which was obtained and suppressed by Judge Urbom, consisting of dynamite, dynamite caps, a 9-volt battery, wire pincers, et cetera, were all in plain sight in the house (A. 24, 54, 55).

The dynamite was found in a coalbin, what had previously been referred to as a cubbyhole, in the basement and is represented by defendant's Exhibit A, a photograph of the area, introduced in the federal court hearing (A. 29). The area was about six feet deep and the dynamite was in plain sight. Officer Swanson was familiar with this type of dynamite as it was the same as had been pre[redacted]nd in the past few months in Omaha (A. 28, 2[redacted] battery of the same type that was on the bo[redacted]nite caps, long-nosed pliers, and other

paraphernalia were also found in plain sight (A. 47, 56, 57).

Five days later, on August 27, 1970, David Rice turned himself in to the Omaha police. The usual procedure of taking and cataloging his clothes, giving him a shower and jail clothes was followed (Pl. Ex. F-2, 71:7-23). On the same date the clothing was sent to Washington, D. C. for analysis and dynamite particles were found in the cuffs of David Rice's clothes (Pl. Ex. F-2, 79:15-25).

The state district court and the Supreme Court of Nebraska both held the search warrant valid. *State v. Rice,* 188 Neb. 728, 199 N. W. 2d 480. Judge Urbom, in his memorandum and order of March 30, 1974, found it invalid. Although the issue of the validity of the search without a warrant was presented by both sides to the state Supreme Court, it was never necessary for the state courts to go into this issue.

Judge Urbom held it was not necessary to send the case back to state court to take additional testimony and pass upon the issue of the validity of the search without a warrant, after he found the warrant invalid, to meet exhaustion requirements (Memorandum, March 30, 1974, p. 9).

Other facts are contained in the argument where necessary.

———o———

SUMMARY OF THE ARGUMENT

1. The exclusionary rule is now primarily a rule of deterrence but its effectiveness in that regard is most questionable. This is especially true because the police and others cannot comprehend the complexity of search and seizure law, or when the police do violate the Fourth Amendment, they frequently are otherwise acting in good faith. Even if the goal of not offending the imperative of judicial integrity is still included in the exclusionary rule it should not be offended when the police are acting in good faith as above mentioned. The exclusionary rule applies to release the guilty in many cases but offers no remedy to the innocent and actually punishes society. The exclusionary rule therefore should be modified or abolished provided an alternative is supplied which will, in fact, deter the police departments, the governmental subdivisions which employ them and the individual policemen. Some alternatives suggested are that the exclusionary rule not be used except when there has been a substantial violation of the Fourth Amendment or in serious crimes where the Fourth Amendment violation is minute as compared to releasing a heinous criminal. Others have suggested fines of varying degrees against the employing agency, minimum judgments in tort actions, taking into consideration the proven policies and procedures of the particular police department including punitive damages in cases where willful or reckless disregard of individual rights are involved, discharge of the particular policeman involved, and graduated disciplinary actions against the policeman depending upon the nature of the violation and his prior record.

Finally, that meaningful alternatives can be designed which will not only deter the police better than the exclusionary rule but will avoid releasing the guilty defendant and provide a remedy for the innocent.

2. This court in *Michigan v. Tucker*, 471 U. S 433, abstained from applying the exclusionary rule in a Fifth Amendment context because all it could do would be to penalize a police error committed before the announcement of the exclusionary rule. While the present case occurred in a different time frame, the complexity of the search and seizure law and otherwise good faith of the Omaha police together with the fact that the evidence obtained under a Fourth Amendment violation is the same whether obtained legally or illegally, would justify the court in not applying the exclusionary rule in the present case.

3. Both lower federal courts determined that the police had to have probable cause to believe that Duane Peak, for whom the police had an arrest warrant was on the Rice premises at the time of entry before the police were authorized to seize the evidence which was in plain view. We contend that the test is reasonableness and that the police were acting reasonably when they went to a known hangout of Duane Peak's to execute the arrest warrant, were fearful that dynamite was in the community and that there may be further bombings, the lights in the house were on and the television set was playing, they knocked on the door and, in fact, did not disturb anyone since the premises were unoccupied, and did not enter the premises until they thought they were acting under a valid search warrant, constitutes reasonableness.

4. In the present case when the police left the scene to apply for a search warrant they were obviously in a hurry and did not use all of the material in the police department's possession in their affidavit to show probable cause. Nevertheless, a lawyer admitted to the bar of Nebraska who is also the police magistrate issued a search warrant. Later at the suppression hearing additional evidence was presented which it is contended was sufficient to validate the original affidavit. The Supreme Court of Nebraska discussing a number of U. S. Supreme Court cases held that it was proper to bolster the missing portions of the affidavit for a search warrant at the later suppression hearing because the United States Supreme Court has not resolved the controversy as to whether the police must always get a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient.

5. Since both the state trial court and the state Supreme Court found the affidavit for a search warrant was sufficient, the issue of search without a warrant was never gone into in the state courts although the issues were briefed and argued to the state Supreme Court.

Later the federal district court on habeas corpus found the affidavit invalid but ruled that it was not necessary to go back to the state court for exhaustion purposes but that any additional evidence necessary could be presented in the federal district court. The state contends that there has been no exhaustion and that the matter could be better handled at the state trial level where the state prosecutors and police are familiar with the evidence.

6. At common law and until 1969, collateral attack on violation of the Fourth Amendment grounds was not permitted in federal court convictions although such collateral review continued to rapidly increase as to state court convictions.

State courts normally provide at least a trial and direct review as well as a post conviction remedy. There should be a point at which finality of a conviction is reached, save in those cases where there is a valid claim of innocence or other important societal interest involved, for the protection of other values of our criminal law system. These include effective utilization of limited judicial resources and preservation of state-federal relations among others.

A meaningful alternative to the exclusionary rule can be designed which will deter police, compensate the victim and still permit valid evidence to be used; if such is devised, there will be no necessity for collateral review of state convictions in federal court for alleged search and seizure violations unless there is a valid claim of innocence or other important societal interest which all of us, of course, wish to protect.

ARGUMENT

1. The exclusionary rule should be modified in search and seizure cases.

A. Commentary.

It is clear from the citations by this court in search and seizure cases involving the exclusionary rule over the past four or five years that the court has read, cited and discussed most, if not all, of the arguments and law review articles attempting to analyze the pros and cons of the exclusionary rule. For this reason, we will attempt to avoid repetition as much as possible and do our best to make this brief, brief.

To start with, of course, this court is thoroughly familiar with the Honorable Chief Justice Burger's outstanding article as far back as 1964 when then Judge of the United States Court of Appeals for the District of Columbia, he wrote "Who Will Watch the Watchman," Vol. 14, the American University L. Rev. No. 1, p. 1. Similarly, the court is also thoroughly familiar, we are sure, with the Honorable Mr. Chief Justice Burger's dissenting opinion in *Bivens v. Six Unknown Federal Narcotics Agents,* 403 U. S. 388, 29 L. Ed. 2d 619, 91 S. Ct. 1999, and particularly the illogic exposed therein of the practice of inflicting the same penalty of excluding the evidence in all the various gradations of conduct by police from good faith down to the use of Gestapo-type tactics or in the belief that the police will suffer from suppression; the prosecutor may suffer—certainly society and the nation suffers, but rarely the individual policeman.

The court has also cited and undoubtedly has had quoted to it large portions of the excellent study by Dallin H. Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. 665 (1970). As this court is well aware, this is one of the few discussions of the exclusionary rule which sets forth actual studies and statistics and attempts to draw some conclusions therefrom.

While the temptation is great to quote from various parts of this article of nearly one hundred pages, knowing the court's undoubted familiarity therewith, we will limit ourselves to a portion of the postscript which Mr. Oaks freely admits is based partially on his "own polemic on the rule". It is also arrived at from the actual factual material set forth in the article. A portion of this postscript concludes:

> "The exclusionary rule should be abolished, but not yet.
>
> "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. . . . The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task.
>
> "The use of the exclusionary rule imposes excessive costs on the criminal justice system. It provides no recompense for the innocent and it frees the guilty. It creates the occasion and incentive for large-scale lying by law enforcement officers. It diverts the focus of the criminal prosecution from the guilt or innocence of the defendant to a trial of the police. Only a system with limitless patience with

> irrationality could tolerate the fact that where there has been one wrong, the defendant's, he will be punished, but where there have been two wrongs, the defendant's and the officer's, both will go free. This would not be an excessive cost for an effective remedy against police misconduct, but it is a prohibitive price to pay for an illusory one. . . .
>
> ". . .
>
> "As to search and seizure violations, the exclusionary rule should be replaced by an effective tort remedy against the offending officer or his employer. Some of the law reforms necessary to make such a remedy effective were discussed earlier. A practical tort remedy would give courts an occasion to rule on the content of constitutional rights (the Canadian example shows how), and it would provide the real consequence needed to give credibility to the guarantee. . . . And it is time to abandon the irrational and costly procedure by which police behavior is reviewed only when the injured party is prosecuted, and the only compensation for injury effectively puts both guilty parties beyond the reach of the law."

Most discussions of the exclusionary rule imply, at least originally, that it is based upon an unwillingness to offend "the imperative of judicial integrity" or to deter illegal searches and seizures by police in the future or both. In the present case where the police officers had a valid arrest warrant for Duane Peak which they sought to execute by going to two of Duane Peak's known hangouts before arriving at the Rice premises (A. 14), which are the premises in question, and was also one of Peak's known hangouts, the police in good faith surely thought they had a right to enter this known hangout to execute the arrest warrant. However, undoubtedly because of their fear that they may not properly be interpreting the

law of search and seizure, took the time for two of the police officers to go to headquarters to prepare an affidavit (A. 9) for a search warrant of the Rice premises and present the same to a lawyer-magistrate (Neb. Rev. Stat. § 26-103 (Reissue 1964)) who issued a search warrant thereon (A. 10). Surely the police here cannot be charged with knowledge of unconstitutional acts as stated in the recent case of *United States v. Peltier,* issued June 25, 1975, — U. S. —, 95 S. Ct. 2313, where this court speaking on the retroactivity question stated:

> ". . . If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. . . ."

This court further stated in the same case at 2317:

> ". . . It would seem to follow *a fortiori* from the *Linkletter* and *Fuller* holdings that the 'imperative of judicial integrity' is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by the law enforcement officials is not permitted by the Constitution. . . ."

And likewise reaffirmed the language from *Michigan v. Tucker,* 417 U. S. 433, 447, 41 L. Ed. 2d 182, 94 S. Ct. 2357 (1974), that:

> " 'The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right. . . .' "

The force of the above language clearly illustrates that the conduct of the police in the present case was not such that would offend the imperative of judicial integrity or could possibly deter future police behavior keeping in mind the complexity of the law of search and seizure itself. On the latter problem, the observations of Charles Alan Wright, Charles T. McCormick, Professor of Law at the University of Texas in 1972, even prior to many of the recent refinements of the law of search and seizure, noted:

> "There is a third reason why the Exclusionary Rule may not deter that seems to me even more forceful than the first two. A police officer *will not be deterred* from an illegal search *if he does not know* that it is illegal. The law of search and seizure is hopelessly complicated and confused. In a treatise on criminal procedure that I published in 1969 I devoted 145 pages to the subject, though I did not purport to deal exhaustively with it. In the first two years after that treatise appeared there had been so many important developments that I have an additional thirty-six pages on the subject in a supplement to the treatise. It defies reality to think that the average police officer could hold all of that arcane learning in his head or that he could always apply it correctly when he is required to make quick decisions in the course of the difficult and often dangerous business of law enforcement. . . ." (Emphasis added.)
>
> "Must the Criminal Go Free If the Constable Blunders?", 50 Texas L. Rev. 736, 740.

As the court is aware, *Michigan v. Tucker, supra,* involved the Fifth Amendment and as the court, of course, well knows, the case for limiting the exclusionary rule to "willful or at the very least negligent, conduct" is much

stronger for search and seizure cases inasmuch as the evidence obtained in violation of the Fourth Amendment search and seizure provisions is the identical evidence whether obtained legally or illegally whereas evidence obtained in violation of the Fifth Amendment may by reason of the very method used be tainted.

We really need not enter into whether the "judicial integrity" argument by supporters of the exclusionary rule continues to be one of the reasons for its existence; since even under that philosophy it should not be applied in this case. The argument seems to continue from the often quoted dissents of the Honorable Justices Holmes and Brandeis in *Olmstead v. United States,* 277 U. S. 438, at 469, 471, 72 L. Ed. 944, that the government should not "play an ignoble part," and that the evidence would be excluded "in order to preserve the judicial process from contamination." As mentioned before, "judicial integrity" is not offered when the officers, as in the present case, "reasonably believed in good faith that their conduct was in accordance with the law." *Linkletter v. Walker,* 381 U. S. 618, 14 L. Ed. 2d 882, 85 S. Ct. 1731; *United States v. Peltier, supra,* nor was such conduct "at the very least, negligent." *Michigan v. Tucker, supra.* Even if that could be said, it would be difficult to determine what was to be "deterred" in the future in the event such integrity is said to be offered or deterrence attempted from the conduct in this case, then the exclusionary rule clearly should be modified. On the other hand, in the area of rejecting reliable evidence through the exclusionary rule, especially in search and seizure questions, Wigmore and Cardozo, also have expressed strong opinions to the

harmfulness of the fact finding process that this has caused. In the now famous case of *People v. DeFore,* 242 N. Y. 13, then Judge Cardozo emphasized that under such a rule "the criminal is to go free because the constable has blundered." Similarly, Wigmore recognized that the exclusionary rules "serve neither to protect the victim nor to punish the offender but rather to compensate the guilty victim by acquittal and to punish the public by unloosing the criminal in their midst. . . ." Wigmore on Evidence, § 2184 (McNaughton Ed., 1961). As noted by the Honorable John J. Gibbons, Judge, U. S. Court of Appeals for the Third Circuit, the "expert opinions" of Justice, then Judge Cardozo and Wigmore, plus Chief Justice Weintraub's in opinions such as *State v. Bisaccia,* 58 N. J. 586: and *State v. Boykins,* 50 N. J. 73, "are entitled to great consideration." Gibbons' "Practical Prophylaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," Vol. 3, Seton Hall L. Rev. 295, 305.

At the present time, the argument in support of the exclusionary rule, as recognized by Professor Wright in 50 Tex. L. Rev. 736, at 738, mentioned above, is now in two parts. *First,* that there is no other effective remedy to enforce the Fourth Amendment and *second,* that the exclusionary rule deters the police from violating Fourth Amendment rights by making it profitless for them to seize evidence illegally.

From the mounds of material written adversely to the second proposition, it appears that it has not only had grave doubts cast upon it, but been nearly destroyed. Let us then take a look at the first proposition.

B. Alternatives or Modification to the exclusionary rule in search and seizure cases.

As suggested by the Honorable Mr. Chief Justice Burger, a number of states and Federal Congress have attempted to draft some form of tort liability as an alternative to the Exclusionary Rule. As mentioned in our petition for certiorari, Nebraska, in 1969 adopted a Political Subdivisions Tort Claims Act, Neb. Rev. Stat. § 23-2401, et seq. (Reissue 1974) and the State Tort Claims Act, Neb. Rev. Stat. § 81-8209, et seq. (Reissue 1971), both waiving sovereign immunity in many cases. While these statutes are still undoubtedly deficient, there is no reason that we can see why they could not be drafted in such a way to give a real remedy to persons damaged by violation of the Fourth Amendment and to also actually deter unlawful police action. Many writers have also come up with suggested alternatives or modifications.

As pointed out by Professor Wright in 50 Texas L. Rev. 736 at 744, mentioned earlier, the facts of *Mapp v. Ohio,* 367 U. S. 643, 6 L. Ed. 2d 1081, 81 S. Ct. 1684 (1961), were so drastic that drastic action was called for; on the other hand, from the facts of *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022 (1971), in which a 14 year old girl was kidnapped and eight days later her frozen body was found at the side of the road, her throat slashed and she had been shot in the head, when the convicted slayer was released because the Attorney General who issued the search warrant had an interest in the case was more difficult for the man on the street to reconcile. In such cases as *Coolidge, supra,* he would apply a different rule because turning criminals of this kind free can only be justified by clear and convincing evidence that its benefit to society outweighs this obvious cost and the exclusionary rule falls far short of meeting that test. He then concludes:

> "I suggest that a line can be drawn, preserving the Exclusionary Rule for cases like the Mapp case while rejecting it for cases like the New Hampshire case. A solution of this kind has been proposed by the American Law Institute, a respected group of judges, lawyers, and professors, and is embodied in a bill introduced in the Senate by Senator Lloyd Bentsen of Texas. This would allow the courts to receive illegally-obtained evidence unless there has been a 'substantial' violation of the fourth amendment. The bill lists a number of factors that the courts would be required to consider in deciding whether the violation had been 'substantial' in a particular case, of which the most important would be the extent to which the police had deviated from what the fourth amendment permits, the extent to which their violation was willful, and the extent to which exclusion of the evidence would tend to prevent similar violations in the future. . . ."

The bill probably referred to by Professor Wright above is now contained in the ALI, a Model Code of Prearraignment Procedure approved May 20, 1975, §§ 290.2(3) and (4).

Carter LaPrade, of the New Haven, Connecticut Bar and formerly an assistant United States Attorney for the Southern District of New York and the District of Vermont, has suggested that an alternative means of enforcing the Fourth Amendment consists of the assessing of a fine against the employer governmental unit of the errant police officer after the sovereign, through its legislature,

had waived governmental immunity. He suggests a maximum assessed permissible fine to be in a meaningful amount varying with the nature of the particular sovereign from perhaps $50,000 against the federal government and lesser amounts against local authorities, depending upon their size. He further suggests that the amount to be awarded up to the maximum be based upon the seriousness of the Fourth Amendment violation citing both the ALI Model Code of Prearraignment Procedure and the Honorable Chief Justice Burger in *Bivens v. Six Unknown Federal Narcotics Agents, supra.*

In support of his argument that fines will deter, he concludes:

> ". . . Pity the sheriff, county D. A., or FBI Director appearing before a hostile legislative committee for next year's funding and explaining how, as a result of illegal searches, his office caused the forfeiture of X dollars of the taxpayer's money. Law enforcement officials clearly do not want scarce funds going into the pockets of criminal suspects as windfalls, a sentiment probably even more vehement among officers on the street than commanders up the line."
>
> "An Alternative to the Exclusionary Rule Presently Administered Under the Fourth Amendment" (1974) 48 Conn. Bar Journal 100, 109.

Of course, the present petitioner does not contend that the present case can be applied to other than state prosecutions.

A two-fold modification of the exclusionary rule is suggested in the Stanford Law Review, the first part of which is akin to the one mentioned above. That is that the exclusionary rule not apply in the most serious cases,

i. e. treason, espionage, murder, armed robbery, and kidnapping by organized groups. The exclusionary rule would be invoked in extreme police violations such as exemplified in *Rochin v. California,* 342 U. S. 165, 96 L. Ed. 183, 72 S. Ct. 205. The argument in favor of this modification is that the exclusionary rule would at least preclude exclusion of evidence where the police misconduct was far less serious than the crime sought to be proven. He suggests that a set of "core" rules, more specific than the *Rochin* test, could be developed, violations of which would lead to use of the exclusionary rule.

By limiting the exclusionary rule to lessor crimes it may be argued that police departments would actively encourage violation of the Fourth Amendment to solve them. If so, the author argues that the "core values" could be held to be violated and the exclusionary rule invoked. Furthermore, the nonuse of the exclusionary rule in serious cases could be supplemented by fines and court actions already discussed against top level police officers and possibly the officers involved; such a remedy would certainly do away with the public outcry against releasing serious criminals for relatively minor blunders on the part of the police. It would also, the author argues, give the departments and the courts more time to develop and interpret the Fourth Amendment as applied to less serious crimes where most of the motions to suppress occur.

The second portion of the modifications suggested by the Stanford article would stress more scrutiny, more affirmative action on the police departments themselves in developing standards, policies, etc. to see that the police are better informed and that the departments are striving

to follow the Fourth Amendment. Presumably, in actions against the department for damages or fines, the efforts and policies of the particular police department would be relevant to the court in determining the amount of damages or fine to be invoked. John Kaplan, Professor of Law, Stanford Law School, "The Limits of the Exclusionary Rule" Volume 26, Stan. L. Rev. 1027 at 1046, 1047, 1050 (May, 1974).

Another suggested remedy from California would be to enact a statute similar to the California Civil Rights Act, Cal. Civ. Code Sections 51 and 52 which guarantees equal rights in public accommodations and provides a minimum of damages of $250.00 for denial of equal rights in public accommodations. The writer suggests that for every such offense the employing governmental subdivision would be liable for actual damages suffered and suggests an addition of $300.00 thereto. He also advocates punitive damages to be awarded in cases where there is found to have been a willful or reckless disregard of an individual's rights. Also, in those cases where damages are awarded the aggrieved party should be entitled to recover reasonable attorney's fees and court costs. "The Decline of the Exclusionary Rule: An Alternative to Injustice" 4 Southwestern University L. Rev. 68, 80.

A similar remedy suggested providing collection of damages against a governmental unit and the officer, provided the trier of fact shall find the following:

> "Whether the officer violated the claimant's Fourth Amendment's rights; if the officer violated the claimant's Fourth Amendment rights, whether the violation was committed in an intentional, a reckless, or a grossly negligent manner."

The remedy then suggests that a minimum amount be prescribed by statute and any additional damages to compensate the claimant. It would further provide that if the trier of fact found that the violation was intentionally committed that the officer be discharged from government service; that if the act were committed in a reckless or grossly negligent manner that a penalty attached to the officer's salary in the amount and duration prescribed by statute; that each time said officer is found to have committed a Fourth Amendment violation either in a reckless or grossly negligent manner, the penalty shall increase according to a schedule prescribed by statute. The plan would also envision possible disciplinary action by the Civil Service Commission or other agency of the governmental subdivision and that no individual group, union or other representative of a government office shall indemnify the officer in whole or in part for any liability resulting under the plan. The plan would permit the officer to purchase liability insurance provided that no individual, group, union, etc. shall pay in whole or in part the premium or other charge for the insurance. "For Fourth Amendment Violations" Vol. 58, Judicature Number 2, August, 1974, pp. 75, 76.

Finally, the Honorable Justice Lynn D. Compton, Associate Justice, Court of Appeals, Second Appellate District of California, who served in the Los Angeles District Attorney's office for 19 years, the last four as Chief Deputy during which he was the prosecutor in the *Sirhan* case was appointed in 1970 as Chairman of the First California Conference on the Judiciary. As Chairman of the Honorary Committee Reviewing the Exclusionary Rule in the Third California Conference, he filed

a report to the Legislature entitled "The Exclusionary Rule: A Special Advisory Committee Report." After several pages of discussion the Committee concluded that the California Constitution should be amended providing for outright elimination of the exclusionary rule and providing a remedy to the innocent citizen who is offended by an unreasonable search and seizure characterized as an "Equal Rights Law". Similar to other plans outlined above, the Committee suggested the claimant be provided with two civil remedies, one against the public entity employer or, two, against the individual officer who violated the Fourth Amendment. One action would exclude the other. Should the claimant pursue his action against the employing agency, if he were successful, he would obtain a minimum of $250 plus attorney's fees and costs.

We respectfully submit that the primary purpose of the exclusionary rule as applied to state prosecutions is the deterrence of unlawful police action. That the objective of deterrence as to future police action cannot work or does not work when the law is too complicated for the police and many times the lawyer magistrates and other legal advisors to understand or when the police otherwise act in good faith. That the exclusionary rule if applied at all should only apply to cases where the defendant may show affirmatively that the police violated the Fourth Amendment intentionally or in bad faith.

That meaningful alternatives to the exclusionary rule can be devised which will not only deter the police and their employers from violating the Fourth Amendment but encourage them to adopt policies and procedures to prevent the same.

The time to end the experiment in our history when heinous criminals go free because of the operation of the exclusionary rule has come. There is practically unanimity in the segment of the law enforcement field which deals with these matters that the rule is not working; even the law review writers, generally law professors, whom one would normally expect to be on the other side of the issue, as illustrated in the commentary and suggestions, in general and for the most part agree that the exclusionary rule is not working and should be modified. It has had sufficient time to prove itself, and it has failed. While the past damage cannot be repaired, there is nothing to be gained by waiting any longer to effect the inevitable change which we all know must come for more realistic law enforcement as well as an equitable remedy for the innocent whose Fourth Amendment rights are violated.

2. Should not Michigan v. Tucker, 417 U. S. 433, 41 L. Ed. 2d 182, 94 S. Ct. 2357, Prevent Exclusion of the evidence in this case?

The application of the exclusionary rule has recently been put in a more realistic context in the opinion of the majority of this court in *Michigan v. Tucker*. With regard to the concept of penalizing police errors through the sanction of the exclusion of evidence, the court stated:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore, we must

consider whether the sanction serves a valid and useful purpose." (94 S. Ct. at 2365.)

Tucker involved the question of whether the testimony of a third-party witness, whose existence became known to the police only through the statements of a rape suspect who had concededly been improperly advised of his rights pursuant to the requirements of *Miranda v. Arizona,* 384 U. S. 436 (1966), should have been suppressed.[1] The court held that the testimony of the third party witness was properly admissible and not the "fruit of the poisonous tree."

Tucker then was decided in the context of the application of the Fifth Amendment; however, the opinion makes it clear that the same consideration espoused by the court in the paragraph from the opinion quoted above are equally applicable to Fourth Amendment issues, such as those which are presented in the instant case. Thus, the court, in *Tucker,* continued:

> "We have recently said, in a search and seizure context, that the exclusionary rule's 'prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures.' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. We then continued:
>
> "'"The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only

1 Actually Miranda had not been decided when the statements in question were obtained; however, since the interrogation took place pre-Miranda but the trial of the accused took place after the Miranda decision, Miranda was applicable to the case under the doctrine of Johnson v. New Jersey, 384 U. S. 719 (1966).

> effective available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217 [4 L. Ed. 2d 1669, 80 S. Ct. 1437] (1960).' United States v. Calandra, slip op, p. 9, 38 L. Ed. 2d 561. (Footnote omitted.)
>
> "In a proper case this rationale would seem applicable to the Fifth Amendment context as well." (94 S. Ct. at 2365.)

There seems to be little doubt, then, that, in the eyes of the Supreme Court majority in *Tucker,* considerations of the validity of sanctions against the police in the form of exclusion of evidence apply equally to Fourth and Fifth Amendment questions.

Significantly, for the purposes of the issues presented in the instant case and for the arguments made in this brief, the court's opinion in *Tucker* stressed the fact that the concept of deterrence of improper police conduct, upon which the exclusionary rule is based, and the question of whether the police were acting in good faith are inextricably intertwined. The *Tucker* opinion continued:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (94 S. Ct. at 2365.)

This pronouncement lies at the heart of the instant case. We submit that it would be difficult to discover a

case in which the police were acting in *more* good faith or one in which the supposed deterrent against future "misconduct" would be *less*, should the decision of the lower court suppressing the evidence in this case be sustained.

There is even more reason for such abstention in a search and seizures case where there is no question as to the validity of the evidence seized as contrasted to the possibility of the confession being tainted in a Fifth Amendment case.

However, the United States Court of Appeals for the Eighth Circuit in the present case indicated in part III of its opinion that it was still bound by prior holdings of the United States Supreme Court rejecting a plea for an application of *Michigan v. Tucker* when it stated:

> "But the court in *Tucker* did not overturn the exclusionary rule, and it is still the law of the land. We are obliged to apply that law."

It then proceeded to allude to some negligent conduct on the part of the Omaha police in conducting a widespread investigation in disregard of the constitutional rights of others, whereas in reality, the evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises (*Rice v. Wolff, Jr.*, No. 74-1682, Petition for Certiorari, Appendix 1, p. 55). The only place entered prior to going to the Rice premises was the NCCF headquarters.

3. Should not "reasonableness" under all the circumstances be the test for a search with a valid arrest warrant?

Both the United States Court of Appeals for the Eighth Circuit and the United States District Court for the District of Nebraska hold steadfastly to the proposition that before a search of premises under a valid arrest warrant may be had the police must have probable cause to believe that the person to be arrested is on the premises at the time (*Rice v. Wolff, Jr.*, Appendix 1, p. 51, Appendix 2, p. 81, Petition for Certiorari). As the court well knows, Article IV of the United States Constitution is divided into two clauses, the first relating to the right of the people to be secure against "unreasonable" searches and seizures and the second, that no warrants shall issue but upon probable cause.

We respectfully contend that the key word regulating searches and seizures is the word "unreasonable." We believe the lower courts have put undue stress in this case upon "probable cause" to believe the suspect is on the premises at the time of entry rather than upon whether or not the entry was "reasonable". The interests of the state and citizens of Omaha under the circumstances far outweighed the interests of the defendant. The Court of Appeals and the District Court both say *Warden v. Hayden*, 387 U. S. 294, 18 L. Ed. 2d 782, 87 S. Ct. 1642 is not applicable because the officers in *Hayden* had probable cause to believe the suspect was on the premises. We say this court upheld an officer with no warrant opening the lid of a washing machine to look for weapons (the machine was too small to hide the suspect) not be-

cause they had probable cause to believe the suspect was on the premises (although this goes to the reasonableness question), but because it was not unreasonable to open the lid of the washing machine under the circumstances. As this court there said:

> "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape."

The same is true in the present case, except that in the present case the circumstances were even more exigent, the police had an arrest warrant and a search warrant, and the police opened the door of the premises rather than the door of the washing machine. Once they did so all of the evidence was in plain sight. The test of reasonableness has been met and a dogged adherence to a phrase that one must have "probable cause to believe the suspect is on the premises at the time" while it may be applicable to the second part of the Fourth Amendment concerning securing of a warrant or when time and danger are not factors, it should not be used to invalidate a "reasonable" entry, to exercise an arrest warrant which had already been secured upon "probable cause." The Court of Appeals (App. 1, p. 54, Petition for Certiorari) and the lower court used against the Omaha police the fact that they delayed the entry to obtain a search warrant saying this shows there was not exigent circumstances. Such reasoning not only punishes

the police for trying to comply with what they conceived the law to be in obtaining a warrant when possible, but also overlooks the fact that the lights in the house were on, the television was playing and the police who remained to guard the premises could see inside the house that there were many other units of the Omaha police following leads and working on the case around the city in the hopes of preventing further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance as the opinions indicate.

4. May additional facts be presented at the suppression hearing to bolster and validate the original affidavit for a search warrant?

In *Spinelli v. United States*, 393 U. S. 410, 21 L. Ed. 2d 637, 89 S. Ct. 584, this court cited *Draper v. United States*, 358 U. S. 307, 3 L. Ed. 2d 327, 79 S. Ct. 329, as an appropriate example of probable cause. It there said:

> "The detail provided by the informant in Draper v. United States, 358 U. S. 307 (1959), provides a suitable bench mark."

The court went on to point out that the government informant did not state the way in which he had obtained his information but he did describe with minute particularity the clothes that Draper would be wearing, the train he would arrive on and other details. And, that independant police work corroborated much more than one small detail that had been provided by the informant. Upon meeting the Denver train on the second morning specified by the informer the police saw a man whose

dress corresponded precisely to the informant's description and since the report was of a sort which, in experience, may be recognized as having been obtained in a reliable way, the court stated that probable cause had been established.

In the present case at the time of making the affidavit for the search warrant, the police department had ample information to constitute probable cause for the issuance of the warrant, but much of the information was omitted from the affidavit because of the extreme volume of police reports and pressure of time. At the hearing on the motion to suppress adequate supplementary evidence known to the police at the time of the affidavit was presented sufficient to establish its authenticity as in *Draper, supra.* Furthermore, *Whitely v. Warden,* 401 U. S. 560, 28 L. Ed. 2d 306, 91 S. Ct. 1031 indicates that the facts may be supplied later to support the previously issued arrest warrant. Neither the United States Court of Appeals for the Eighth Circuit nor the United States District Court for the District of Nebraska would adopt this approach, holding to the view that sufficient information must be presented to the magistrate at the time the warrant issues (See Appendix 1, p. 39 and Appendix 2, p. 68).

This court in *Coolidge v. New Hampshire,* 403 U. S. 443, 29 L. Ed. 2d 564, 91 S. Ct. 2022, discussed the conflict or disagreement over the importance of requiring law enforcement officers to secure warrants pointing out that some have argued that a determination by a magistrate of probable cause as a precondition of any search or seizure is so essential that the Fourth Amendment is violated whenever the police might reasonably have obtained a warrant but failed to do so. But, that others have argued with equal force that a test of reasonableness, applied after the fact of the search or seizure when the police attempt to introduce the fruits in evidence affords ample safeguards for the rights in question so that "the relevant test is not whether it is reasonable to procure a search warrant, but whether the search was reasonable."

In the present case two judges of the Supreme Court of Nebraska in a concurring opinion suggested that the affidavit for a search warrant should be validated by the evidence in possession of the police at the time of the search warrant but not included therein but which was later presented at the hearing for the motion to suppress. On February 6, 1975, the Supreme Court of Nebraska referred to this case *State v. Dussault,* 193 Neb. 122, — N. W. 2d — holding in a unanimous opinion as follows:

> "We discussed what we believe to be the import of Aguilar and Spinelli in State v. Rice, *supra,* and will not repeat it here. Moreover, we indicated in that case that the contents of the affidavit may, at a suppression hearing, be supplemented by other evidence known to the police and if in toto probable cause may be said to have existed at the time of the search, the motion to suppress shall be denied. We there cited Draper v. United States, *supra,* and Whiteley v. Warden, *supra,* as supporting the position we there took. We now expressly hold that at a hearing on a motion to suppress, the contents of the affidavit for arrest or search may be supplemented by additional information proved to have been known by the police at the time the affidavit was made and the warrant issued, but not set forth in the affidavit. See State v. Rice, *supra,* at p. 755, opinion

of McCown, J., concurring in result. Such a principle we deem proper in view of the fact that the United States Supreme Court has not resolved the controversy as to whether the police must always get a warrant when it is reasonably possible to do so, or whether a test of reasonableness applied after the fact of the search is sufficient to protect constitutional rights. * * *'' (193 Neb. at 127).

This problem deserves the further attention of this court.

5. After the federal district court ruled the search warrant was invalid should not it have sent the case back to the state district court for the evidentiary hearing on the question of entry and search without a warrant for exhaustion of that issue?

Since both the state trial court and the state Supreme Court found that the search warrant was valid it had no occasion to ever go into the facts or the law as to whether the entry and search would have been valid without the warrant. This was never even presented to the state district court. While it was briefed and argued to the state Supreme Court it cannot be assumed that the state Supreme Court seriously considered the question since it was unnecessary to its finding.

Of more importance, had the federal district court sent the case back to the state trial court in Douglas County, Nebraska, the Douglas County Attorney and his staff who tried the case originally and who with the police department were much more familiar with the case than the Attorney General's Office, could undoubtedly have

developed the facts more thoroughly and convincingly than was done in the federal district court.

The stand of the United States Court of Appeals for the Eighth Circuit (Appendix 1, p. 46, Petition of Certiorari) here seems to be in direct conflict with the stand of the same court in *Goham v. Wolff*, 471 F. 2d 52, where the Supreme Court of Nebraska had determined that the retrocession of federal jurisdiction over Indian lands was invalid but made no determination as to pending cases even though the matter was briefed and argued to the state Supreme Court. When the case reached the United States District Court for the District of Nebraska the district court found the retrocession to be valid and remanded the case to the state Supreme Court for exhaustion of the state remedy as to pending cases. The state Supreme Court refused to act upon the matter and upon appeal to the United States Court of Appeals, it affirmed the United States District Court that there had been no exhaustion. We see no distinction from the present case and, in fact, in the present case there is much more need for exhaustion than in the *Goham* case.

6. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case where there is no doubt of the guilt of respondent nor any societal interest to be served is a question properly cognizable under 28 U. S. C. § 2254.

Before 1969, as this Court will well remember, most of the United States Courts of Appeals held that a federal conviction could not be collaterally attacked under

a 28 U. S. C. § 2255 proceeding on the grounds of an illegal search and seizure. In fact, many of us in positions in the various states responsible for attempting to uphold state court convictions, and particularly the State of Nebraska, in the United States Court of Appeals for the Eighth Circuit, argued that state court convictions were entitled to the same recognition and dignity as federal court convictions and that it followed that if search and seizure questions could not be attacked collaterally after a conviction in federal court, neither should they be allowed to be attacked collaterally in the federal court under 28 U. S. C. § 2254 after a state court conviction.

Before this argument had an opportunity to reach fruition, this Court, in 1969, in *Kaufman v. United States,* 394 U. S. 217, 22 L. Ed. 2d 227, 89 S. Ct. 1068, took the opposite tack and held that allegations of s e a r c h and seizure after conviction in a federal court could be used in a collateral attack under 28 U. S. C. § 2255 case. However, there were three dissents in that decision. In one dissent the Honorable Mr. Justice Black declared:

> "It was formerly the rule in this country that judgments were so impervious to collateral attack that a defendant could not collaterally attack his conviction even after the Government had admitted his innocence. That rule, obviously a harsh and what might seem to most people an indefensible one, has of course now been abandoned. It was finally put to rest in Fay v. Noia, 372 U. S. 391, 9 L. Ed. 2d 837, 83 S. Ct. 822 (1963). It is this element of probable or possible innocence that I think should be given weight in determining whether a judgment after conviction and appeal and affirmance should be open to collateral attack, for the great historic role of the writ of habeas corpus has been to insure the reliability of the guilt-determining process. . . ." (394 U. S. 217 at 234)

The Honorable Mr. Justice Harlan and Mr. Justice Stewart also dissented in which they stated that they concurred with much of Mr. Justice Black's opinion but did not agree that the availability of habeas corpus must turn on petitioner's assertion that he was in fact innocent; they did agree that the availability of habeas corpus to contest illegal searches and seizures collaterally should be limited to special circumstances of the sort suggested in *Thornton v. United States,* 368 F. 2d 822. In *Thorton v. United States* the Court of Appeals for the District of Columbia stated in part:

> "The courts are called on to evolve and provide procedures and remedies that are effective to vindicate constitutional rights. However, where effective procedures are available in the direct proceeding, there is no imperative to provide an additional, collateral review, leaving no stone unturned, when exploration of all avenues of justice at the behest of individual petitioners may impair judicial administration of the federal courts, as by making criminal litigation interminable, and diverting resources of the federal judiciary."

Even despite the above language, it is interesting to note that the State of Nebraska, which provides direct review of every criminal conviction, also adopted a post conviction procedure in 1965 which was reviewed in this Court in *Case v. Nebraska,* 381 U. S. 336, 14 L. Ed. 2d 422, 85 S. Ct. 1486. In that case the State of Nebraska passed a post conviction remedy pending the hearing in this Court on the question of whether or not a state must provide a collateral remedy for testing federal constitutional rights.

As pointed out by the Honorable Mr. Justice Brennan, concurring, the petitioner in *Case v. Nebraska* contended that substituting federal habeas corpus for state corrective process, as had been the policy prior to the enactment of the Nebraska post conviction procedure, was a disservice to sound principles of federalism, had put an intolerable strain on the federal writ and mounting friction between state and federal courts. In response to this the Honorable Mr. Justice Brennan stated:

> "The desirability of minimizing the necessity for resort by state prisoners to federal habeas corpus is not to be denied. Our federal system entrusts the States with primary responsibility for the administration of their criminal laws. The Fourteenth Amendment and the Supremacy Clause make requirements of fair and just procedures an integral part of those laws, and state procedures should ideally include adequate administration of these guarantees as well . . . ." (381 U. S. 336 at 344).

More recently, as this Court is also well aware, in *Schneckloth v. Bustamonte,* 412 U. S. 218, 36 L. Ed. 2d 854, 93 S. Ct. 2041, the Honorable Mr. Justice Blackmun, concurring, pointed out that he was a member of the Court of Appeals whose order was reversed by *Kaufman v. United States,* discussed above, that he was in agreement with nearly all that Mr. Justice Powell had to say in his concurring opinion in *Schneckloth.* Mr. Justice Powell, with whom Mr. Chief Justice Burger and Mr. Justice Rehnquist joined, concurring in *Schneckloth* at 412 U. S. 250, sets forth an excellent discussion of the place of habeas corpus under the common law, its development and where it should be today. We would not presume to even come close to improving upon the argument

there set forth. Instead, we would like to briefly emphasize a few of his excellent remarks. First, on the rare contention that the search rendered the evidence unreliable or that its means cast doubt upon the prisoner's guilt:

> "Habeas corpus review of search and seizure claims thus brings a deficiency of our system of criminal justice into sharp focus: a convicted defendant asserting no constitutional claim bearing on innocence and relying solely on an alleged unlawful search, is now entitled to federal habeas review of state conviction and the likelihood of release if the reviewing court concludes that the search was unlawful. That federal courts would actually redetermine constitutional claims bearing no relation to the prisoner's innocence with the possibility of releasing him from custody if the search is held unlawful not only defeats our societal interest in a rational legal system but serves no compensating ends of personal justice." (412 U. S. at 258).

On the costs in terms of serious intrusions on other societal values, not to further justice on behalf of arguably innocent persons but to serve mechanistic rules quite unrelated to justice in a particular case:

> ". . . Nor are these neglected values unimportant to justice in the broadest sense or to our system of Government. They include (i) the most effective utilization of limited judicial resources, (ii) the necessity of finality in criminal trials, (iii) the minimizaton of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded." (412 U. S. at 259).

Mr. Justice Powell further emphasizes in *Schneckloth* that the exclusionary rule on collateral attack not only retains its major liabilities but its hoped for deterrent function is even more weakened coming months or years after the claimed intrusion.

The present case is a classic example of the reason why search and seizure questions should not properly be cognizable in federal habeas corpus. The main brief and the reply brief of David Rice on direct appeal in the Supreme Court of Nebraska are exhibits in the present case marked Plaintiff's Exhibits L1 and L2. Nowhere in said briefs is there any hint that Rice was innocent or that any interests of society were to be served by reversing the conviction or excluding evidence. Furthermore, Duane Peak, the person who actually planted the suitcase bomb and called in the 911 call to police headquarters, testified on behalf of the state concerning the making of the bomb by himself, David Rice, and Edward Poindexter at the home of David Rice (Pl. Ex. F4:425-444). We also call the Court's attention to the defendant's Exhibit N, Newsletters of the NCCF advocating violence to the police. All of the above evidence from the state court was admitted by stipulation. Finally, we call the attention of the Court to the federal petition for writ of habeas corpus (A. 4) in which neither innocence nor any other important issue to society is mentioned.

Professor Bator, in his article cited by Mr. Justice Powell in *Schneckloth*, points out that the problem of finality in criminal cases raises acute tensions in our society. But though society purports to bring citizens to the bar of judgment for condemnation for breaking the

laws'' . . . our instinct is that we must be sure before we proceed to the end, that we will not write an irrevocable *finis* on the page until we are somehow truly satisfied that justice has been done.'' (Bator, ''Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,'' 76 Harv. L. Rev. 441.) He points out that our society is particularly sensitized because of the abuses of power exercised through the legal process, through the age of dictators, etc. We could not agree more. However, we have devoted a long portion of this brief in Argument 1, as have many of the amicus briefs, to alternatives to the exclusionary rule in search and seizure cases. We sincerely and respectfully contend that this Court may, through the many alternatives suggested, design a remedy which will in fact deter violations of the Fourth Amendment in a much greater and more meaningful way than the use of the exclusionary rule and with that remedy available the person who has been convicted in state court through the use of evidence obtained by a violation of the Fourth Amendment will have no justification for collateral attack in the federal courts unless he has a valid claim of innocence or other justification of societal importance.

—o—

CONCLUSION

For the reasons expressed in the foregoing arguments, petitioner respectfully prays that the judgment of

the United States Court of Appeals for the Eighth Circuit herein be reversed and the case remanded with instructions that a writ of habeas corpus not issue and the petition for writ of habeas corpus be dismissed.

Respectfully submitted,

PAUL L. DOUGLAS
Attorney General of Nebraska

MELVIN KENT KAMMERLOHR
Assistant Attorney General
State of Nebraska

2115 State Capitol Building
Lincoln, Nebraska 68509
Telephone: (402) 271-2682

Attorneys for Petitioner

Supreme Court, U. S.
FILED
OCT 3 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE RESPONDENT

WILLIAM C. CUNNINGHAM, S.J.
801 Ladera Lane
Santa Barbara, California 93108

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102
Telephone: (402) 341-4018

Washington, D.C. • CLB PUBLISHERS' ↄ LAW PRINTING CO. • (202) 393-0625

INDEX

Page

OPINIONS BELOW 1

JURISDICTION 1

QUESTIONS PRESENTED 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 8

SUMMARY OF THE ARGUMENT 18

ARGUMENT:

I. THE MODIFICATIONS OF THE EXCLUSIONARY RULE WHICH NEBRASKA PROPOSES, WOULD SUBSTANTIALLY THWART THE OPERATION OF THAT RULE AND LEAVE FOURTH AMENDMENT RIGHTS WITHOUT REMEDIAL PROTECTION. IF THE FOURTH AMENDMENT IS TO BE MORE THAN A FORM OF WORDS, THESE MODIFICATIONS SHOULD BE REJECTED. IN ANY EVENT, THE PROPOSED MODIFICATIONS HAVE NO RELEVANCE TO THE FACTS OF THIS CASE AND HENCE WOULD NOT SAVE THE SEARCH 28

A. To Make The Operation Of The Exclusionary Rule Depend Upon The Absence Of Good Faith On The Part Of Police Officers Would Substantially Diminish The Deterrent Effect Of The Exclusionary Rule. In Any Event, The Evidence Here Does Not Demonstrate That The Police Acted In Good Faith 41

B. To Allow Supplementation Of A Defective Affidavit For A Search Warrant In A Subsequent Hearing On A Motion To Suppress Would Amount To An Elision Of The Warrant Clause From The Fourth Amendment. In Any Event, The Additional Information Upon Which Nebraska Relies Does Not Establish Probable Cause 57

C. The Proposed Reasonableness Under The Circumstances Test, Which Would Not Require The Police To Have Probable Cause Before They Made Entry To Search, Would Totally Eviscerate The Protection Of Privacy Provided By The Fourth Amendment. In Any Event, The State's Argument That The Police Search Here Was Reasonable Has No Basis In The Facts 69

II. THE COURTS BELOW CORRECTLY HELD THAT RICE HAD EXHAUSTED HIS STATE REMEDIES ON THE ISSUE OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK 74

III. THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. §§2254 TO ENTERTAIN RICE'S PETITION FOR HABEAS CORPUS AND TO GRANT HIM THE RELIEF WHICH HE SOUGHT 76

A. Adoption Of The Fair Opportunity Limitation On Federal Habeas In Search and Seizure Cases Would Constitute An Impermissible Interference With The Legislative Authority Of Congress. If Such A Change In The Historic Reach Of Federal Habeas Is To Be Made, The Change Should Emanate From Congress 78

1. The Original History and Subsequent Evolution of §§2254 Fully Support The Jurisdiction Of The District Court Over A State Petitioner's Habeas Corpus Action Grounded Upon A Claim Of Improper Denial Of The Suppression Remedy 80

2. The Modern Scope Of Federal Habeas Corpus, Which Includes Within Its Zone State Search and Seizure Cases, Is Fully Consistent With The Historic Understanding Of The Writ At The Time The Constitution Was Adopted 91

3. The Policies Which Underpin The Extension Of Federal Habeas Corpus Jurisdiction To State Prisoners Fully Support The Application Of That Jurisdiction To Cases In Which The Petitioner Claims That His Conviction Was Procured Because Of A Misapplication Of Fourth Amendment Learning 97

B. The Removal Of Search and Seizure Questions From The Scope Of Federal Habeas Corpus Would Substantially Diminish The Deterrent Effect Of The Exclusionary Rule 108

C. Any Change In The Scope Of Federal Habeas Should Be Applied Prospectively Only 120

CONCLUSION 120

CASES CITED

Cases: *Page*

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 37

Aguilar v. Texas, 378 U.S. 108 (1964) 119

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 388 (1971) 20, 39, 64

Blue Chip Stamps v. Manor Drug Stores, 43 Law Week, 4707 (1975) 103, 106

Brinegar v. United States, 338 U.S. 160 (1949) 51, 68

Brown v. Allen, 344 U.S. 443 (1953) ..... *passim*

Brown v. Illinois, 43 Law Week 4937 (1975) 40, 42, 62, 64

Burnside v. Nebraska, 346 F.2d 88 (8th Cir. 1965) 77, 106

California v. Hurst, 325 F.2d 891 (9th Cir. 1963) 76

Callies v. State, 157 Neb. 640, 61 N.W.2d 370 (1953) 117

Camara v. Municipal Court, 387 U.S. 523 (1967) 19, 22, 70, 71

Carafas v. LaValle, 391 U.S. 234 (1968) 77

Carfer v. Caldwell, 200 U.S. 293 (1906) 77

Carroll v. United States, 267 U.S. 132 (1925) 22, 51, 70

Cohens v. Virginia, 6 Wheat. 264 (1821) 93

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 58

Dandridge v. Williams, 397 U.S. 471 (1970) 50

Elkins v. United States, 364 U.S. 206 (1960) 19, 33, 43, 50

Ex parte Bollman, 4 Cranch 75 (1807) 81

Ex parte Dorr, 3 How. 103 (1845) 81

Ex parte Lange, 18 Wall. 163 (1873) 90

Ex parte McCardle, 73 U.S. 318 (1868) 85

Ex parte Seibold, 100 U.S. 371 (1879) 90

Ex parte Watkins, 3 Pet. 193 (1836) 81

Fahey v. Mallonee, 332 U.S. 245 (1947) 59

Page

Fay v. Noia, 372 U.S. 391 (1963) ..... *passim*

Francisco v. Gathright, ___U.S.___, 42 L.Ed. 2d 226 (1974) 76

Frank v. Mangum, 237 U.S. 309 (1915) 113

Fuentes v. Shevin, 407 U.S. 67 (1972) 50, 60

Fugate v. Ronin, 167 Neb. 70, 91 N.W.2d 240 (1958) 117

Georgia v. United States, 411 U.S. 526 (1973) 103

Gerstien v. Pugh, ___U.S.___, 43 L.Ed. 2d 54 (1975) 59, 60

Gertz v. Welch, 418 U.S. 323 (1974) 46, 48, 50

Hall v. Warden, 313 F.2d 483 (4th Cir. 1963) 76

Halloway v. Wolff, 482 F.2d, 110 (8th Cir. 1973) 119

Hans Nielson, Petitioner, 131 U.S. 176 (1889) 90

Harris v. New York, 401 U.S. 222 (1971) 64

Henry v. Mississippi, 379 U.S. 443 (1965) 77, 106

Hester v. United States, 265 U.S. 57 (1924) 32, 70

Hubbard v. Tinsley, 336 F.2d 854 (10th Cir. 1964) 77

Humphrey v. Cady, 405 U.S. 504 (1972) 23, 75

Johnson v. United States, 333 U.S. 10, 14 (1948) 37, 58

Johnson v. Zerbst, 304 U.S. 458 (1938) 84, 90

Katz v. United States, 389 U.S. 347 (1967) 19, 31, 32, 58, 69

Katzenbach v. Morgan, 384 U.S. 641 (1966) 79, 107, 108

Kaufman v. United States, 394 U.S. 217 (1969) 24, 78, 115-116

Kirby v. Illinois, 406 U.S. 682 (1972) 63

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 51, 57, 114

LeDent v. Wolff, 460 F.2d 1001 (8th Cir. 1972) 119

Linkletter v. Walker, 381 U.S. 618 (1965) ..... *passim*

Losieau v. Sigler, 421 F.2d 825 (8th Cir. 1966) 117

Mancusi v. DeForte, 392 U.S. 364 (1968) 31, 69, 77

Page

Mansfield, C. & L.M.R.R. v. Swan, 111 U.S. 379 (1884) 77
Mapp v. Ohio, 367 U.S. 643 (1961) ..... *passim*
Marcus v. Search Warrant, 367 U.S. 717 (1961) 119
Martin v. Hunter's Lessee, 1 Wheat. 304 (1816) 93
Matters v. Ryan, 249 U.S. 375 (1919) 77
McCray v. Illinois, 386 U.S. 300 (1967) 51
McCreary v. Nebraska, 86 S.Ct. 1877, 364 U.S. 979, 16 L.Ed. 2d 689 (1966) 119
McCreary v. Sigler, 406 F.2d 1264 (8th Cir. 1969) 119
McMann v. Richardson, 397 U.S. 759 (1970) 110
McNabb v. United States, 318 U.S. 332 (1943) 59
Michigan v. Tucker, 417 U.S. 433 (1974) 42,45,51
Mitchell v. W.T. Grant Co. 416 U.S. 600 (1974) 60
Moore v. Dempsey, 261 U.S. 86 (1923) 90,119
Mickey v. Mississippi, 292 U.S. 393 (1934) 59
North Georgia Finishing, Inc. v. Dichem, Inc., __U.S.__ 42 L.Ed. 2d 751 (1974) 60
Op Cotton Mills v. Administrator, Department of Labor, 312 U.S. 126 (1941) 59
Oregon v. Hass, 43 Law Week 4417 (1975) 64
Picard v. Conner, 404 U.S. 270 (1971) 23,75
Quantity of Copies of Books v. Kansas, 378 U.S. 205 (1964) 119
Rice v. Wolff, 388 F.Supp. 185 (8th Cir. 1974) ..... *passim*
Rice v. Wolff, 513 F.2d 1280 (1975) 118
Roaden v. Kentucky, 413 U.S. 496 (1973) 58
Roberts v. Lavallee, 389 U.S. 40 (1967) 76
Rochin v. California, 342 U.S. 165 (1952) 103
Rogers v. Richmond, 365 U.S. 534 (1961) 103
Sanders v. United States, 373 U.S. 1 (1963) 75

Page

Scheuer v. Roads, 416 U.S. 232 (1974) 51
Schneckloth v. Bustamonte, 412 U.S. 218 (1973) ..... *passim*
See v. Seattle, 387 U.S. 541 (1967) 31
Sgro v. United States, 287 U.S. 206 (1932) 66
Shadwick v. City of Tampa, 407 U.S. 345 (1972) 61
Simmons v. United States, 390 U.S. 377 (1968) 115
Sisck v. Lane, 331 F.2d 235 (7th Cir. 1964) 77
Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) 60
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 107
Spinelli v. United States, 393 U.S. 410 (1969) 119
Stanford v. Texas, 379 U.S. 478 (1965) 119-120
Steffel v. Thompson, 415 U.S. 552 (1974) 82
State v. Bazis, 190 Neb. 586, 210 N.W.2d 919 (1973) 119
State v. Dussault, 193 Neb. 122, 225 N.W.2d 558 (1975) 119
State v. Glouser, 193 Neb. 190, 226 N.W.2d 328 (1975) 119
State v. Grayer, 191 Neb. 523, 215 N.W.2d 859 (1970) 117
State v. Halloway, 187 Neb. 1, 187 N.W.2d 85 (1971) 119
State v. Howard, 184 Neb. 274, 167 N.W.2d 80 (1969) 119
State v. Huggins, 186 Neb. 704, 185 N.W.2d 849 (1971) 119
State v. Kallos, 193 Neb. 113, 225 N.W.2d 553 (1975) 119
State v. LeDent, 185 Neb. 380, 176 N.W.2d 21 (1970) 119
State v. McCreary, 179 Neb. 589, 139 N.W.2d 362 Cert. denied (1966) 119

Page

State v. Nydegger, 186 Neb. 61, 187 N.W.2d 892 (1970) 115

State v. Rice, 188 Neb. 728, 199 N.W.2d 480 (1972)

State v. Torrence, 192 Neb. 213, 219 N.W.2d 772 (1974) 119

State v. Waits, 185 Neb. 780, 178 N.W.2d 774 (1970) 119

Terry v. Ohio, 392 U.S. 11 (1968) 70

Thornton v. United States, 368 F.2d 822 (D.C. Cir. 1966) 77

Tollett v. Henderson, 411 U.S. 258 (1973) 110

Townsend v. Sain, 372 U.S. 293 (1963) 114

Treinies v. Sunshine Mining Co., 308 U.S. 66 (1940) 77

U.S. ex rel Anglet v. Fay, 333 F.2d 12 (2d Cir. 1964) 77

U.S. ex rel Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963) Aff. 381 U.S. 618 (1965) 76

United States v. Calandra, 414 U.S. 338 (1974) 34, 42, 64

United States v. Haley, 371 U.S. 18 (1962) 77

United States v. Hayman, 342 U.S. 205 (1952) 79, 84

United States v. Peltier, 43 Law Week 4918 (1975) 42, 45, 51

United States v. United States District Court, 407 U.S. 297 (1972) 21, 58

United States v. United States Gypsum Co. 333 U.S. 364 (1948) 114

United States v. Ventresca, 380 U.S. 102 (1965) 51, 114

United States v. Wade, 388 U.S. 218 (1967) 63

Vaughn v. Menlove, 3 Bing. (N.C.) 468, 132 Eng. Rep. 490 (1837) 44

Walker v. Johnston, 312 U.S. 275 (1941) 84

Waley v. Johnson, 360 U.S. 101 (1942) 90

Page

Warden v. Hayden, 387 U.S. 294 (1967) 77, 91

Warren v. United States, 311 F.2d 673 (8th Cir. 1963) 106

Wilson v. Porter, 361 F.2d 412 (9th Cir. (1966)) 77

Wilwording v. Swenson, 404 U.S. 249 (1971) 75

Wood v. Strickland, 43 Law Week 4293 (1975) 49, 50, 51, 115

Wyman v. James, 400 U.S. 309 (1971) 32

Yates v. United States, 354 U.S. 298 (1957) 67, 119

Yick Wo v. Hopkins, 118 U.S. 356 (1886) 90

Zwickler v. Koota, 389 U.S. 241 (1967) 82

Constitutional Provisions and Statutes Cited:

Judiciary Act of 1789, 1 Stat. 81 ..... 80-81, 87

Habeas Corpus Act of 1867, 14 Stat. 385 Ch. 28, 1 (1867) ..... *passim*

U.S. Constitution, Article III 107

U.S. Constitution, Amend. I, IV, V, XI, and XIV ..... *passim*

28 U.S.C. §§2254 and §§2255 ..... *passim*

Texts and Articles Cited:

Amsterdam, Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial, 113 U. of Penn. L. Rev. 793 (1965) ..... *passim*

Amsterdam, Perspectives on the Fourth Amendment 58 Minn. L. Rev. 349 (1974) ..... *passim*

Amsterdam, Search, Seizure and Section 2255; A Comment, 112 U. of Penn. L. Rev. 378 (1964) 89, 99, 101, 104

Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 79, 81, 88, 94, 100

Bender, The Retroactive Effect of an Overruling Constitutional Decision, Mapp v. Ohio, 100 U. of Penn. L. Rev. 650 (1962) 89

Page

Bloustein, Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser, 39 N.Y.U. L. Rev. 962 (1964) 31

Bright, The Changing Nature of the Federal Appeals Process in the 1970's, 65 FRD 496 100

Chevigny, Police Power 62

Collings, Habeas Corpus for Convicts, Constitutional Right of Legislative Grace?, 40 Cal. L. Rev. 335 (1952) 79, 80, 88, 89

Comment, Proposed Modification of Federal Habeas Corpus for State Prisoners–Reformer Revocation, 61 Geo. A.J. 1221 (1973) 107

Cong. Globe, 39th Cong., 1st Session 32, 39 (July 27, 1866) 86

Cong. Globe, 39th Cong., 1st Sess. 41, 51 (July 25, 1866) 85

Developments in the Law–Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 91, 99, 110, 111

Dicey, The Law of the Constitution (10th Ed.) 96

Feinberg, The Expressive Function of Punishment in Doing and Deserving 41

Fried, An Anatomy of Values, (1970) 30

Friendly, Is Innocence Irrelevant? Collateral Attack on Criminal Judgements, 38 U. of Chi. L. Rev. 142 (1970) 107-108

Fustedler, Comedy in the Constitution, 37 N.Y.U. L. Rev. 841 (1972) 107

Hart, Forward; the Time Chart of the Justices, 73 Harv. L. Rev. 84 (1959) 90, 91, 99

Haynsworth, A New Court to Improve the Administration of Justice, 59 A.B.A.J. 841 (1973) 107

Haynsworth, Improving the Handling of Criminal Cases in the Federal Appellate System, 59 Corn. L. Rev. 597 (1974) 107

Page

Kier, The Constitutional History of Modern Britain (8th Ed.) 96

Lay, Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved, 21 DePaul L. Rev. 701 (1972) 108

Lucas, The Principals of Politics, (1966) 31, 96

Mishkin, Forward, The High Court, the Great Writ, and the Due Process of Time and Law, 79 Harv. L. Rev. 86-87 (1965) 99, 110

Mishkin, The Federal "Question" in the District Courts, 53 Colum. L. Rev. 157 (1953) 97, 105

Myers, The Habeas Corpus Act of 1867; The Supreme Court As Legal Historian, 33 U. of Chi. L. Rev. 31 (1965) 85, 86, 87

Niederhoffer, Behind the Shield: The Police and Urban Society 37, 47

Oaks, Habeas Corpus in the States–1776-1865, 32 U. of Chi. L. Rev. 243 (1965) 92, 93, 95

Oaks, Legal History in the High Court–Habeas Corpus, 64 Mich. L. Rev. 451 (1966) 92, 95

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Chi. L. Rev. 665 (1970) ..... *passim*

Pollack, Proposal to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ, 66 Yale L.J. 50 (1956) 79, 102

Posner, Economic Analysis of Law ..... *passim*

Potter, History and American Society (1974) 36

Prosser, Torts 4th 47

Reich, The New Property, 73 Yale L.J. 733 (1964) 32

Reiss, The Public and the Police 33, 38, 44, 47

Reitz, Federal Habeas Corpus; Post-Conviction Remedy for State Prisoners, 108 U. of Penn. L. Rev. 461 (1960) 99, 102

Page

Restatement of Torts, 2d., Sec. 12 (2) Sec. 388, Sec. 402A and Sec. 292A 43, 46, 47

Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev., 1, (1956) 88

Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974) 35

Schwartz, Retroactivity, Reliability and Due Process, Reply to Professor Mishkin, 33 U. of Chi. L. Rev. 719 (1966) 103

Skolnick, Justice Without Trial (2d Ed.) 44, 109

Skolnick, The Politics of Protest: A Report to the National Commission on the Causes and Prevention of Violence (Ballantine, 1969) 36, 37, 38, 61, 62

Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives, 2 J. of Leg. Studies, 243 (1973) 33

Traynor, The Devils of Due Process in Criminal Detection, Detention and Trial, 33 U. of Chi. L. Rev. 657 (1967) 103

Weick, Apportionment of Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated? 21 DePaul L. Rev. 740 (1972) 108

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHT CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinions of the District Court are at 388 F.Supp. 185 (D. Neb. 1974). The opinion of the Court of Appeals (App. I of Petition) is reported at 513 F.2d 1280 (8th Cir. 1975).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. May the suppression remedy be denied on the grounds that police were acting in good faith in making the search, even though they acted in contravention of Constitutional standards, in a case where they had no probable cause to believe that seizables were on premises, where no emergency situation existed requiring immediate action, and where the testimony of the police officers demonstrates that in making the search they acted on nothing more than a hunch?

2. Where the police searched residential premises pursuant to a search warrant issued on an affidavit which did not show probable cause, may the suppression remedy be withheld because of additional police information introduced at the suppression hearing which is merely cumulative of the contents of the affidavit already held to be defective?

3. May the suppression remedy be withheld on the grounds that a search was reasonable in a case where police entered and searched residential premises with a defective affidavit, without probable cause to believe that a seizable was on the premises, and where no emergency situation existed where life or property was threatened?

4. Where the Supreme Court of the State has held that a search was lawful because the warrant pursuant to which it was conducted was validly issued, should the United States District Court, having found the warrant invalid, have remitted the petitioner for habeas corpus to the state courts to litigate the validity of alternative justification of the search already presented to the State Supreme Court but not passed upon by it?

5. Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C. Section 2254.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

AMENDMENT 4

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

AMENDMENT 14

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective

numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, Representatives in Congress, the Executive and Judicial Officers of a state, or the members of the Legislative thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or Elector of President and Vice-President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the

United States, or any claim for the loss or emancipation of any slaves; but all such debts, obligations, and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 U.S.C. §2254

2254. (a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent

jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit–

(1) that the merits of the factual dispute were not resolved in the State court hearing;

(2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;

(3) that the material facts were not adequately developed at the State court hearing;

(4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;

(5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;

(6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or

(7) that the applicant was otherwise denied due process of law in the State court proceeding;

(8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record: And in an evidentiary hearing in the proceeding in the

Federal court, when due proof of such factual determination has been made, unless the existence of one or more of the circumstances respectively set forth in paragraphs numbered (1) to (7), inclusive, is shown by the applicant, otherwise appears, or is admitted by the respondent, or unless the court concludes pursuant to the provisions of paragraph numbered (8) that the record in the State court proceeding, considered as a whole, does not fairly support such factual determination, the burden shall rest upon the applicant to establish by convincing evidence that the factual determination by the State court was erroneous.

(e) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(f) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

STATEMENT OF THE CASE

David Rice is detained at the Nebraska Penal and Correctional Complex where the petitioner is the warden. He is there pursuant to a jury verdict of guilty and judgment and sentence to a term of life imprisonment pronounced upon him by the District Court of Douglas County, Nebraska on April 17, 1971. The jury found Rice guilty of the crime of first degree murder. The killing involved was the killing of Larry D. Minard, Sr., a member of the Omaha Police Department. Minard was killed on August 17, 1970, while making a police call. While on the premises where the call was being investigated, he was killed when a bomb exploded. The conviction of Rice was affirmed by the Supreme Court of the State of Nebraska on July 14, 1972 in an opinion reported at 188 Neb. 728, 199 N.W.2d 480 (1972).

After Rice's conviction was sustained in the state courts, he sought habeas corpus in the United States District Court for the District of Nebraska. Rice's attack on his conviction as constitutionally improper was bottomed on a claim that the products of two unconstitutional searches were admitted in evidence against him. (App. 5-6) The first search involved the search and seizure at his residence at 2816 Parker Street in Omaha, Nebraska on August 22, 1970. The second search involved the seizure and subsequent chemical examination of his clothing conducted on and after August 27, 1970, the date upon which he was arrested. Ultimately, the United States District Court accepted Rice's argument and granted the writ, directing his release unless he be tried within 90 days after the order became final and no longer subject to review. 388

F.Supp. 185 (1974). On the warden's appeal, the United States Court of Appeals for the Eighth Circuit affirmed the decision of the District Court. 513 F.2d 1280 (1975).

The search and seizure issue arose in the following way. Minard, and other police officers who accompanied him, had gone to a home in Omaha as a result of a call on the police emergency number which reported a woman screaming at a residence at 2865 Ohio Street in Omaha. As the police entered the structure, they were forced to step over a suitcase lying on its side in the doorway. Sometime after the initial entry, Minard approached the suitcase and while he inspected it, it exploded, killing him.

The police immediately began an investigation of the crime. After a time, they obtained evidence that Duane Peak, a member of the National Committee to Combat Fascism, a political organization known in the community as the Black Panthers, had been involved in the crime. Specifically, they received information that it was Peak who had made the call regarding the disturbance. They also obtained evidence that Peak had sometime prior to the murder been seen with a suitcase similar to the one used.

The police also had information that Edward Poindexter, another officer of the NCCF, might have been involved in the killing. Specifically, they had been told by Donald Peak, a former member of the NCCF, that Edward Poindexter was the only member of the organization who Peak believed knew how to construct the bomb device. (Deposition of Samuel Cooper, State Court, pp. 19-20). Based upon the information gathered concerning Peak, a warrant was issued for his arrest the afternoon of August 22, 1970. At the same time, an

arrest warrant was issued for Edward Poindexter based upon the statement that he was the only member of the organization who might know how to make a bomb.

The police intelligence squad was familiar with the operations of the NCCF. For sometime prior to the death of Minard they had developed a file on this organization. The file included publications of the NCCF, some of which contained articles by Poindexter or by Rice, which the police interpreted as advocating violence against them.

The police constructed a list of different places where they thought Peak might be. The first of these places was the headquarters of the NCCF. A large number of officers converged there and searched those premises. An arrest was made at those premises. After the officers who made the search and arrest at the headquarters returned to the police station, they were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (App. 71-72). As Lt. Swanson, another officer, describes the instructions that were given, they were ordered "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (App. 35).

How many "known places of the NCCF" were searched in the effort to apprehend Duane Peak is not clear from the record. As Nebraska notes:

> "... The evidence only shows the police went to the NCCF headquarters, Poindexter's home, the home of Frank and Will Peak, before going to the Rice premises.... The only place entered prior to going to the Rice premises was the NCCF headquarters." Brief of petitioner, p. 38.

However, as the State also notes, "... There were many other units of the Omaha Police following leads and working on the case around the city in the hope of preventing further killings. The whole Omaha Police Department did not come to a standstill while the Rice premises were under surveillance..." Brief of petitioner, p. 41.

At about the time that the NCCF headquarters was searched, Poindexter was arrested. The arrest took place at 5:30 in the afternoon of the 22nd. (Poindexter's testimony, State Court, volume 2, p. 68). Pfeffer, one of the officers later involved in the search of Rice's home at 2816 Parker, had been involved in the arrest of Poindexter (State Court Transcript, volume 2, pp. 179-180).

The police had knowledge that Duane Peak, who they were seeking, was a member of the NCCF. Rice was also a member of that organization and one of its officers. His house had been a periodic meeting place for NCCF members. Peak was one of the members of the organization who had visited at Rice's house. The officers therefore went to Rice's house at 2816 Parker Street in search for Peak. At the time police arrived at Rice's house, Poindexter, the other party for whom they had an arrest warrant, had already been under arrest for several hours.

At p. 14 of its brief, the State attempts to rely on the testimony of Lt. Perry to show additional grounds for the search of Rice's house. That testimony was given in the United States District Court hearing. The District Judge specifically refused to give it credit. 388 F.Supp. 198-199.

The State also attempts to suggest that Rice's home was something other than a residence. However, the

only evidence that they point to is the fact that he displayed certain political objects on the house and that he regularly entertained his friends. Whether a house loses its character as a home when the American flag is displayed over it or when people of whom the Attorney General of Nebraska approves are entertained there, the State does not say.

At 10:30 the police arrived at Rice's home. They testified that they found the lights and the television on, but received no response to a knock at the door. The leaders of the police team, Lt. (then Sgt.) Swanson and Lt. (then Sgt.) Pfeffer decided not to enter the house. Rather they decided to obtain a search warrant for Rice's home. As Lt. Swanson explained:

> "Well one thing that had been troubling me all day, since the search of the Black Panther Headquarters, is that there was dynamite someplace but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'why don't we check this house for Duane Peak and we may find some dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (App. 43).

The two command officers then returned to the police station, where they prepared an affidavit for a search warrant. The affidavit consisted of three allegations. (App.. 9-10). The first two, which rested upon the claimed knowledge of the officers, were that:

> "1. David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> "2. A violent killing of a police officer occurred in Omaha and arrests were made from the membership of the NCCF."

The third averment was based upon hearsay, it was that:

> "We have been told in the past that Rice keeps explosives at his residence, and also illegal weapons, which he has said should be used against police officers."

The tip, alleged in the affidavit, had been received by the police at least several weeks, and possibly several months, before the application for the search warrant (State Proceedings, vol. 2, p. 132). This fact, however, was not revealed to the magistrate. The tip was much less positive than the affidavit indicated. As Lt. Swanson testified in state court, "I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that they might store it." (State Proceedings, vol. 2, p. 130)

In addition to the information contained in the affidavit, the police had certain other information, which they introduced in the state court suppression hearing. This information is summarized by the Supreme Court of Nebraska in its opinion at 188 Neb. 738-739, 199 N.W.2d 487-488. It consisted of the following:

> "It is worthy of mention that in connection with the search for explosives and devices at 2816 Parker Street under the warrant, there was conducted simultaneously therewith a search for Duane Peak for whom the police department of Omaha had at that time a warrant for arrest on a charge of first degree murder in connection with the death of Officer Minard. At that time the police department had the following additional

information as shown by the police reports introduced into evidence at the hearing on the motion to suppress: (1) On the morning of August 22, 1970, Donald W. Peak, brother of Duane Peak, was arrested and after having been given the Miranda warnings, voluntarily made a statement to the police. This directly, clearly, and almost conclusively identified Duane Peak as the person who physically delivered the bomb and placed the entrapping phone call; (b) Donald attributed Duane's acts to his membership in the NCCF (sometimes referred to in the record as Panthers); (c) indicated that the bomb had probably been made by Poindexter as head of the organization; and (d) that Duane had been told by headquarters 'to lay low.' (2) Item (1) (a) above was corroborated by five other identified persons from whom statements had been taken by the police department. (3) An identified informant, based on his own knowledge, stated that on the day following the bombing, David L. Rice had said, '. . . the action was a week late.' The informant interpreted the comment as referring to the bombing. (4) Rice and Poindexter were leaders and organizers of the NCCF. (5) A tape recording of the voice which had made the entrapping phone call was identified as that of Duane Peak. (6) Poindexter had been arrested about 6 p.m., on August 22, 1970, and declined to talk. (7) Personal knowledge of the police department that Rice had made statements in party newsletters led to the conclusion that he was an outspoken advocate of violence against police officers. (8) There were reports (plural) from individuals (plural) that Rice stored explosives at his home at 2816 Parker Street. (9) Literature had been found at the headquarters of the NCCF containing 'directions on how to make bombs'."

After obtaining the search warrant, at about 11:30, the two police officers returned to Rice's home and an entrance was made. In a box in the basement, the police testified that they found 14 sticks of dynamite, blasting caps, wiring, a battery, and a pair of long-nosed pliers.

On August 27, Rice voluntarily surrendered himself. Rice was placed under arrest for unlawful possession of an explosive substance. His arrest was based solely upon the items seized by the police at 2816 Parker Street on August 22, 1970. (Stipulation, State Court, vol. 2, p.64).

The clothing Rice was wearing at the time of his arrest was seized by the police and subject to chemical analysis for dynamite particles. The chemist who tested the garment found particles which he identified as ammonia dynamite (State proceedings, Vol. 5, Pages 776-781). However, his testimony was based on the presence of only some of the chemical elements, which constitute ammonia dynamite. He conceded that these chemical elements could be found in other common items in the environment, so that the particles might not have come from dynamite (State proceedings, Vol. 5, Page 838).

In the state courts, Rice sought suppression of the evidence seized at 2816 Parker and suppression of the results of the examination of his clothing as fruits of that search. His principal contention was that the affidavit upon which the warrant to search his home was based was fatally defective. The State introduced evidence to supplement the allegations of the affidavit. In addition, it sought to justify the search on the grounds of the existence of exigent circumstances and because of police possession of an arrest warrant for

Duane Peak. Both the Nebraska trial court and the Supreme Court found the affidavit sufficient. However, the Nebraska Supreme Court alternatively held that the allegations of the affidavit could be supplemented by additional evidence, and that the additional evidence demonstrated probable cause.

At Rice's trial, the principal evidence against him was the testimony of Duane Peak, who confessed that he had placed the bomb which killed Minard. Peak claimed that the bomb had been made at Rice's home, that Rice assisted in the making, and that the bomb had then been stored there. However, Peak's story of Rice's involvement in the case, which he testified to at trial, had not been consistently told. Initially he admitted his own guilt, but named no others. Thereafter, after conferring with his grandfather and an attorney, he gave a new statement in which he claimed that Rice was involved in the construction of the bomb. At Rice's preliminary hearing, he initially refused to answer certain questions. Again, after a visit with his grandfather and his attorney, he told the story he had given in his statement. (State proceedings, Vol. 4, Pages 482-483, 503, 523-525)

While Peak denied being threatened and claimed no deal had been made, after his testimony he was treated as a juvenile delinquent rather than an adult felon. Further, it is fair to say that the police and the prosecutors began with the assumption that Rice was involved with the bombing, and sought evidence to support this assumption, rather than being led to the conclusion that Rice was involved because of evidence which they found. Duane Peak filled the gap between the assumption of involvement and evidence of involvement, and in return, his offense was treated as trivial.

At Rice's trial, the evidence claimed to have been found in his home was used to buttress Peak's credibility. Thus, the dynamite was introduced in evidence. Similarly, the pliers found in Rice's home, a common type long-nosed pliers, was introduced in evidence. Upon the pliers were the remains of common copper wire (State proceedings, Vol. 5, Pages 830-831). In the house next door to the site of the bombing, a small piece of copper wire was found underneath a window (State proceedings, Vol. 5, Pages 739-740). The cut on this piece of wire showed certain similarities and certain dissimilarities to a sample cut on a piece of sheet metal made with Rice's pliers.

Rice testified in his own behalf. He denied involvement in the construction of the bomb. He denied that he had ever possessed either dynamite or blasting caps at his home.

In the federal habeas corpus proceeding, the district court in an opinion filed March 30, 1974, held that the affidavit was fatally defective and did not demonstrate probable cause. The court also held that the affidavit could not be supplemented with the additional information introduced in the state suppression proceeding in order to make out a case of probable cause.

The State had made little or no effort to support its exigent circumstances and arrest warrant justifications for the search. The District Court offered the State an opportunity to so supplement the record.

The State's evidence in the District Court was primarily devoted to the question of whether or not the police had probable cause to believe that Peak was at Rice's house when they went there. The police testimony demonstrated that there was no cause to believe that Peak was at Rice's house.

They had no reports of Peak being at Rice's house. He had not been seen in the vicinity of Rice's house. The only basis for seeking him there was that he was a member of an organization to which Rice belonged.

After the supplemental hearing the district court held that the State had not demonstrated that the police had probable cause to believe that Peak was in Rice's house when they made their entrance. The district court also held that no exigent circumstances existed which would have justified the police search without a warrant and that, in any event, the police had no probable cause to believe that any seizable was in the house at 2816 Parker Street when they made their entrance.

The Court of Appeals affirmed the district court on all issues. Certiorari was then sought by the warden on March 27, 1975. It was granted on June 30, 1975, bringing this case here.

SUMMARY OF THE ARGUMENT

I

Nebraska concedes that the District Court and the Court of Appeals made a proper application of existing Fourth Amendment learning in their decisions in this case. Nebraska seeks to have the exclusionary rule modified to save the search. The proposed modifications must be evaluated to determine their impact upon the functioning of the exclusionary rule. If the modifications substantially impair the tasks assigned to the exclusionary rule, their adoption would trench on rights guaranteed by the Fourth Amendment.

The Fourth Amendment protects the right to privacy by allowing an individual to create a sanctuary wherein he is free from governmental intrusion. *Katz v. United States*, 389 U.S. 347, 351-352 (1967). The expectation of privacy within such a sanctuary is not absolute. It is defeasible when the governmental interest in invading the secluded area overbears the interest in privacy and makes entrance reasonable. *Camara v. Municipal Court*, 387 U.S. 523, 534-537 (1967). However, in the absence of such an overriding interest, an invasion violates the Fourth Amendment.

Since the rights entrenched in the Fourth Amendment were written into the Constitution, they were intended to be meaningful. Rights are not meaningful if they can be invaded cost free.

The Fourth Amendment is part of the fundamental charter of our government. A government, which ignores its own laws loses its claim to legitimacy. *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). If no effective sanction against violation of Fourth Amendment rights is constructed, these rights will be invaded at will by agents of the government. Such invasions will substantially weaken the legal systems claim that it is based on law rather than naked force.

Searches which violate the Fourth Amendment are undertaken to procure evidence for criminal trials. The unlawful search achieves its goal when its fruits are admitted in evidence. In the absence of an effective sanction against the officer who transgresses the Constitution, admission encourages law officers to violate the Fourth Amendment in the future. The courts, which admit the evidence, then become "accomplices in the willful disobedience of the Constitution they are sworn to behold." *Elkins v. United States*, 364 U.S. 206, 223 (1960).

The exclusionary rule was adopted and made applicable to the states in order to serve as a remedy for Fourth Amendment violations. *Mapp v. Ohio*, supra. Existing alternative remedies to the exclusionary rule do not offer a meaningful alternative to it. *Bivens v. 6 Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 421-422 (1971) (dissenting opinion of Chief Justice). While other alternatives have been suggested, neither Congress nor the State Legislatures have seen fit to adopt them. Thus, at least at present, the maintenance of the exclusionary rule is a matter of constitutional necessity.

Since maintenance of the exclusionary rule is a matter of necessity, proposed modifications must be evaluated for their impact on its multiple functions. Modifications, which substantially interfere with its deterrent function or appear to sanction invasions of constitutional rights, must be rejected.

A. Nebraska argues that exclusion vel non should turn on the presence or absence of good faith upon the part of the police officer. The adoption of a situationally rooted good faith test would render highly unpredictable the application of the exclusionary rule. Such unpredictability would substantially lessen its deterrent effect, since if those threatened with sanctions can anticipate the procedure for determining whether or not to apply the sanction will miscarry, they are less likely to conform their standards to the norm. Posner, *Economic Analysis of Law*, p. 333. In any event, the testimony of the police in the courts below and the factual findings of those courts negate the application of a good faith standard to this case.

B. Nebraska argues that the police should be allowed to supplement a defective affidavit for a search warrant

at a hearing on a motion to suppress. The underlying premise of this argument is that the police demonstrate their good faith and allegiance to the Fourth Amendment whenever they seek a warrant. The Fourth Amendment requires that whenever practicable an invasion of a privileged area be preceded by a judicial determination of probable cause. *United States v. United States District Court*, 407 U.S. 297, 316 (1972). If this judicial role is to be meaningful, the justification of the search must be limited to the information presented to the magistrate. If that information can be supplemented, the procurement of the warrant becomes a ritual, and the magistrate is reduced from judge to ceremonial figure. Such invasion of the sanctity of the magistrate's role amounts to an elision of the warrant clause from the Fourth Amendment.

Nor may the mere fact that the police obtain a warrant be treated as demonstrating good faith. The police are responsible for the contents of the affidavit upon which the warrant is issued. They have at least the rudimentary familiarity with the requirements of probable cause. Experienced policemen know their judges, and the police select the magistrate to whom the affidavit goes. Thus, good faith cannot automatically be assumed because a warrant is issued.

In any event, the additional information presented in the state court suppression hearing did not demonstrate the presence of probable cause. The tip upon which the police acted was shown to be uncertain and stale. No evidence was offered to buttress the tipster's reliability.

C. Nebraska argues that the exclusionary rule should be modified so as to judge police conduct in invading premises to search by reasonableness under all the circumstances, and that a search may be treated as

reasonable even though the police lacked probable cause to believe that what they sought was on the premises. If an act is to be judged reasonable, then there must be some reason for the act. However, not just any reasons will do. A search is undertaken to find something. The reasons advanced for a search must be reasons which justify the belief that the things sought are in the place to be searched. If those reasons are to be deemed sufficient, they must be reasons which would persuade a reasonable man to believe that the things sought can be expected to be found in the place to be searched. But that is the definition of probable cause. *Carroll v. United States*, 267 U.S. 132, 162 (1925). Therefore, separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the notion of a reasonable search. *Camara v. Municipal Court*, supra, 387 U.S. 535. Therefore, a search for persons or things may not be judged reasonable if the police lack probable cause.

In any event, the evidence here demonstrates that the police were not acting in an emergency. Nor is any information pointed to which would support a reasonable belief that seizable persons or things were on the premises searched. Therefore, there is no evidentiary support of an evaluation of the search at 2816 Parker as reasonable.

II

Having held that the search at 2816 Parker could not be justified by the warrant, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by Nebraska for the search. In the Supreme Court of Nebraska, Rice

had attacked the validity of the search warrant used to justify the search. The state defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since the Supreme Court of Nebraska upheld the validity of the warrant, it did not pass upon these alternative justifications for the search. Nevertheless, the district court held that the exhaustion requirement of 28 U.S.C., Sec. 2254 had been satisfied on these issues. Its holding was affirmed by the Court of Appeals. These rulings on exhaustion are clearly correct. All that is required is presentation to the highest court of the state. *Picard v. Conner*, 404 U.S. 270, 275 (1971). Since there had been presentation, the requirement of the exhaustion test was met. *Humphrey v. Cady*, 405 U.S. 504, 516 fn. 18.

III

Nebraska seeks to have search and seizure cases excluded from the district courts jurisdiction under 28 U.S.C. Sec. 2254, unless the state has failed to grant a habeas applicant an adequate opportunity to ventilate the search and seizure issues in its state's courts.

In *Brown v. Allen*, 344 U.S. 443 (1953) and again in *Fay v. Noia*, 372 U.S. 391 (1963) this court held that the habeas corpus jurisdiction of the district court reached any case in which the claim was made that a state conviction was infected with constitutional error, that is, any case in which controlling federal constitutional law had been misapplied. When *Mapp v. Ohio*, supra, made the exclusionary rule applicable to the states, that holding brought state search and seizure

cases within the ambit of section 2254. The jurisdiction over search and seizure cases was confirmed in *Linkletter v. Walker,* 381 U.S. 618 (1955) and reiterated in *Kaufman v. United States,* 394 U.S. 217 (1969).

A. *Brown v. Allen* has been law since 1953. Congress has had ample opportunity to overrule it. It has not done so. *Fay v. Noia* was decided in 1963. Congress has had ample opportunity to overrule it. It has not seen fit to do so. *Linkletter v. Walker* was decided in 1965. Congress has had ample opportunity to overrule it, it has not seen fit to do so. In 1966, after all these cases had been decided, Congress reenacted the jurisdictional grant of 2254. *Kaufman v. United States* was decided in 1969. Any doubts that search and seizure cases came within the scope of habeas were laid to rest there. Congress has had the opportunity to overrule that case. It has not seen fit to do so.

The jurisdiction of the inferior federal court and the enforcement of the Fourteenth Amendment are matters for the Congress. Congress exercised its authority when it enacted 2254 in its original form in 1867. Modification of the authority granted by that act is a matter for the Congress.

1. The holding in *Brown v. Allen* reaffirmed in *Fay v. Noia* that federal habeas corpus reached all constitutional error in state proceedings is consistent with the original intent of Congress in granting jurisdiction over all restraints of liberty "in violation of the Constitution." The Habeas Corpus Act of 1867 was the product of a period of intensely nationalistic feeling. It was the product of a skepticism of the ability of state courts to adequately vindicate federally guaranteed rights. The new Habeas Corpus Act was

"designed to furnish a method additional to and independent of direct Supreme Court review of state court decisions for the vindication of the new constitutional guarantee." *Fay v. Noia,* supra, 372 U.S. 415-416.

> "... Federal trial jurisdiction in its timely, efficacious exercise to protect the freedom secured against state action by the postwar amendment ... was the critical concern of the reconstruction congresses. In matters of civil rights, it was their considered resolution of the federal problem. One may agree or disagree with their conception of the appropriate relationship of the nation and the states. Nonetheless, under the Constitution Congress is given primary responsibility for designing the shape of American federalism and for defining the role of federal courts in effectuating its goals. This responsibility forbids winking away the plainly nationalizing purpose of the reconstruction legislation, even on the firm conviction–which the Supreme Court has sometimes not quite managed to conceal–that bad Cad Stevens and his rads were a bit of transient aberration not to be taken seriously." Amsterdam, *Criminal Prosecutions Effecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trials,* 113 U.Pen. L. Rev. 793, 829-830 (1965).

Brown v. Allen and *Fay v. Noia* were the culmination of a steady lengthening of the reach of federal habeas corpus "by reason of the Supreme Court's ever widening translation of the specific guarantees of the National Bill of Rights into the more generalized limitations upon state action stated in the Fourteenth Amendment." McGowan, *The Organization of Judicial Power in the United States,* p. 52. The decisions were solidly rooted in the prior construction by this Court of

the federal habeas jurisdiction. The jurisdiction grew by accretion not by avulsion.

2. The reach given to habeas corpus jurisdiction in *Brown v. Allen* and *Fay v. Noia* is consistent with the historic understanding of the writ at the time of the adoption of the Constitution. At the common law "the writ lay to test any restraint contrary to fundamental law . . ." *Fay v. Noia,* 372 U.S. 426. *Brown v. Allen* and *Fay v. Noia* translate that function from the English setting, where the fundamental right was to be tried according to the ordinary course of common law, into an American setting where specific procedural rights are guaranteed by the written Bill of Rights.

3. The federal habeas jurisdiction exists to assure state prisoners an opportunity to have federal constitutional claims passed upon by federal constitutional courts. Since this Court cannot perform that function in most cases, the task of review is assigned to the district court exercising the habeas jurisdiction. The need for independent review is no less present in cases involving the exclusionary rule, where guilt or innocence is not central to the right violated, than in cases where the right goes to guilt or innocence. Indeed, a right not directly related to guilt or innocence is less likely to excite state court deference to federal interest than one whose relevance to guilt can be directly perceived.

While these arguments for the habeas jurisdiction may be unsound, they have been embodied in this Court's case law for many years. If this long standing construction of the habeas jurisdiction is to be reversed, the proper forum for change is the Congress.

B. One of the principal justifications for the federal habeas jurisdiction is that on the practical level the

state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law. This proximity would have its greatest impact on a judge in a case where the constitutional provision involved was irrelevant to guilt or innocence. Search and seizure cases are a paradigm of constitutional litigation in which guilt or innocence is not involved. They are, therefore, the cases in which it is most likely that federal rules will be ignored in service in the interest of law enforcement.

If the federal habeas corpus jurisdiction over search and seizure cases was removed, the police would foresee a resolution of search and seizure issues primarily by state trial judges likely to be more sympathetic to the policemen than to the Fourth Amendment. Since the efficacy of a sanction turns in large measure on the perception of the risk of detention and adjudication of fault, this anticipation of a friendly forum would substantially ennervate the deterrent effect of the exclusionary rule in cases where it now has an impact. On the other hand, the threat of having conduct reviewed before a federal judge, whose primary allegiance is to the Supreme Court's interpretation of the Constitution, serves as a substantial deterrent, even where the police can foresee being heard in the first instance by a sympathetic state judiciary. Thus, removal of search and seizure cases from the habeas jurisdiction would substantially interfere with the operation of the exclusionary rule.

C. Rice went to the district court and its jurisdiction under section 2254, rather than to this Court, because existing case law indicated that a petition for certiorari was not a prerequisite to habeas. The opinions of the district court and of the court of appeals demonstrate

that the decision of the Nebraska Supreme Court was seriously inconsistent with this Court's interpretation of the Fourth Amendment. Thus, Rice's case was one where certiorari might have been successfully sought. The opportunity to seek direct review is now gone. If the jurisdiction of the district court is now to be modified to exclude search and seizure cases, such modification should not be applied in a case like this. To retroactively apply a modification to this case would be extremely unfair.

ARGUMENT

I.

THE MODIFICATIONS OF THE EXCLUSIONARY RULE, WHICH NEBRASKA PROPOSES, WOULD SUBSTANTIALLY THWART THE OPERATION OF THAT RULE AND LEAVE FOURTH AMENDMENT RIGHTS WITHOUT REMEDIAL PROTECTION. IF THE FOURTH AMENDMENT IS TO BE MORE THAN A FORM OF WORDS, THESE MODIFICATIONS SHOULD BE REJECTED. IN ANY EVENT, THE PROPOSED MODIFICATIONS HAVE NO RELEVANCE TO THE FACTS OF THIS CASE, AND HENCE WOULD NOT SAVE THE SEARCH.

The decisions of the courts below involve a straight forward application of existing learning under the exclusionary rule. The correctness of those decisions under present law is not contested. Rather Nebraska argues that this case presents the Court with an

appropriate vehicle for modification of the exclusionary rule. While Nebraska seeks only modification of the rule, certain of the Amici, New Jersey and Utah, seek the total abolition of the rule in state cases.

In support of its argument for modification of the exclusionary rule, Nebraska offers a cost benefit analysis designed to show that the rule is not worth maintaining. The analysis is fundamentally flawed. The exclusionary rule exists to vindicate Fourth Amendment rights. It cannot be evaluated independently of the rights which the Fourth Amendment guarantees. To ignore the function of the rule in vindicating Fourth Amendment rights is to ignore the Fourth Amendment. The exclusionary rule is the only effective existing remedy for vindication of Fourth Amendment rights. Substantial modification of the exclusionary rule leaves Fourth Amendment rights unprotected. In the absence of an effective alternative remedy already in place, continuation of the exclusionary rule is a matter of constitutional necessity.

Nebraska's arguments with regard to the costs of the exclusionary rule fail to recognize how much of that cost is produced by the Fourth Amendment, rather than by the exclusionary rule. It is the Fourth Amendment that imposes the limitations on police practices, not the exclusionary rule. Implicit in Nebraska's argument is the assumption that Fourth Amendment rights may be weighed against the demands of law enforcement and that a balance can be struck wherever current notions of good social policy require. This type of approach ignores the function of a constitutional bill of rights. A constitutional bill of rights renders the liberties it protects immune from re-evaluation, except through the process of constitutional amendment.

Finally, Nebraska's evaluation ignores other important benefits which the exclusionary rule confers. Since there are no effective alternatives to the exclusionary rule in place, abolition of the rule would free police conduct from exterior review. The police would become a law unto themselves. So long as the exclusionary rule exists, it assures that the police are subject to judicial review of their conduct in making arrests and searches, and hence, renders them subject to the rule of law. Police obedience to law is an essential pre-requisite to the maintenance of legality.

We turn then to an appropriate cost benefit analysis of the exclusionary rule. We believe that this analysis will demonstrate that maintenance of the exclusionary rule is constitutionally required. Once the current necessity of the exclusionary rule is established, Nebraska's proposed modifications to the rule must be evaluated to determine their impact on the operation of the exclusionary rule. If a modification substantially interferes with the functions assigned to the rule, then it must be rejected.

The Fourth Amendment protects the right to privacy. "Privacy is . . . the control we have over information about ourselves." Fried, *An Anatomy of Values,* p. 140 (1970). This control over information is a necessity of human life.

> "The man who is compelled to live every minute of his life among others and whose every need, thought, desire, fancy or gratification is subject to public scrutiny, has been deprived of his individuality, he merges with the mass. His opinion, being public, tend never to be different; his aspirations, being known, tend always to be conventionally accepted one; his feelings being openly exhibited tend to lose their quality of

> unique personal warmth and to become the feelings of every man. Such a being, although sentient is fungible; he is not an individual." Bloustein, *Privacy As An Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U.L. Rev. 962, 1002 (1974).

The Fourth Amendment grants the individual control over information about himself by allowing him to create sanctuaries within which he is free from intrusion. *Katz v. United States,* 389 U.S. 347, 351-352 (1967); *See v. Seattle,* 387 U.S. 541, 543-546 (1967); *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968). The exemplar of such a sanctuary is the private home. Within the home "a man is both free himself to act and secure from other men's unwelcome attentions. Because men have separate homes, we can in general provide a modicum of freedom and security. Often what I am not allowed to do in public–e.g. walking about naked–I am allowed to do in the privacy of my own home: and, far more often if I want immunity from other men's action, I can obtain it by withdrawing into the security of my own home. Homes are, almost literally, spheres of influence. Although, . . . all problems of human conduct cannot be solved by simply dividing up the world into spheres of influence–in part, because men want to interact with one another, and not to be altogether isolated–yet the idea is a natural one, and by assigning men their private spheres, we do ease, even if we do not abolish, conflicts between one man's freedom and another man's security, by providing one or the other with an acceptable alternative." Lucas, *The Principals of Politics,* (1966), pp. 181-182. Because of this special role of the home in the protection of privacy, the protection of the home from unwarranted

invasion lies at the core of Fourth Amendment protection. *Wyman v. James*, 400 U.S. 309, 316-317 (1971).[1]

The authors of the Fourth Amendment entrenched the rights which it protects in the Bill of Rights. Since these rights were written into the Constitution, they were intended to be meaningful. If Fourth Amendment rights are to be meaningful, then some sanction or remediation must be available against the party who invades them. If Fourth Amendment rights can be invaded cost free, they will be. The exclusionary rule was adopted and applied to the States as surety that the Fourth Amendment would not be "reduced to 'a form of words' ", *Mapp v. Ohio*, 367 U.S. 643, 648 (1961).

The Fourth Amendment is part of the Constitution. Judges are sworn to uphold the Constitution. Searches, which violate the Fourth Amendment, are undertaken to procure evidence for criminal trials. The unlawful search achieves its goal when its fruits are admitted in evidence. In the absence of an effective sanction or remedy against the officer who transgressed the

[1]Fourth Amendment protections, "often have nothing to do with privacy at all," *Katz v. United States*, Supra 389 U.S. 350, and protect only property rights. However, at the time the Bill of Rights was adopted radical distinctions were not drawn between personal rights and property rights. The kinds of property with which the authors of the Bill of Rights were familiar, and the kinds they enumerated in the Fourth Amendment, "houses, papers, and effects," are those most intimately connected with personality. See, Reich, *The New Property*, 73 Yale L.J. 733, 771-772 (1964). The Amendment protects property, only when the owner thinks enough of it to seclude it from public inspection. *Hester v. United States*, 265 U.S. 57 (1924).

Constitution, admission encourages the officer to do likewise in the future and by example encourages other officers to emulate him. The courts then become "accomplices in the wilful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960). The exclusionary rule was adopted and made applicable to the States to prevent the courts from playing this base role. *Mapp v. Ohio*, supra, 367 U.S. 659.

Amsterdam well sums up the constitutional status of the exclusionary rule as it emerges from this Court's decisions.

> I am not suggesting that the exclusionary rule is an explicit command of the Constitution nor do I mean to make more of the Fourth Amendments language than the skein of a living thought that dwells within. The rule was fashioned by judges as an expression of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable searches and seizures which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command." Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 433 (1974).

The alternative remedies to the exclusionary rule currently in place do not offer a meaningful alternative to the exclusionary rule. Oaks, *Studying the Exclusionary Rule In Search and Seizure*, 37 U. of Chi. L. Rev. 665, 673-674; Amsterdam, op. cit., 58 Minn. L. Rev. 429-431; Spiotto, *Search and Seizure: An Empirical Study of the Exclusionary Rule and Its*

Alternatives, 2 J. of Leg. Studies, 243, 269-273 (1973). Reiss, *The Public and the Police,* pp. 190-191. Abandonment of the exclusionary rule would amount to abandonment of the Fourth Amendment. Amsterdam, op. cit. 58 Minn. L. Rev. 431.

The principle cost of the exclusionary rule is the suppression of relevant evidence. Sometimes, the suppression of evidence allows the guilty to go free. However, much of this cost is an inevitable result of the limitations imposed upon police practices by the Fourth Amendment. If the exclusionary rule is to be replaced, it can only be replaced by a rule which is a greater deterrent to police misconduct than the exclusionary rule. However, if a more forceful deterrent is adopted, it presumably would decrease the number of unlawful searches and seizures. If unlawful searches and seizures must be conducted to detect crime, a more effective deterrent would not free the guilty, but it would prevent their being apprehended, since fewer unlawful searches would be undertaken. The bar to unlawful searches and seizures is not the exclusionary rule; it is the Fourth Amendment. Oaks, op. cit., *Exclusionary Rule in Search and Seizure,* 37 U. of Chi. L. Rev. 754.[2]

---

[2]Our argument proceeds on the assumption that exclusion is derivative from the Fourth Amendment and not part of the Fourth Amendment right. That assumption represents current law. *United States v. Calandra,* 414 U.S. 338, 354 (1974). On past occasions, however, this Court has viewed exclusion as "an essential part of the right to privacy". *Mapp. v. Ohio,* supra, 367 U.S. 656. On the view that exclusion is derivative, a defendant is not deprived of constitutional right by the admission of evidence illegally seized from him. However, if exclusion is part of the right to privacy, admission is a new wrong.

A person places in his private sanctuary that which he wishes to keep secret. Intrusion invades the sanctuary and violates his

Derivative from its role in the protection of the Fourth Amendment is the exclusionary rule's function of preserving the institution of legality. The American

---

right to privacy. However, his secrets are known only to the intruders. Subsequent dissemination by the intruders of the information found constitutes an additional invasion of privacy. Information about the person, which he was entitled to keep secret, is made public.

There is another version of the argument that a wrong is done by admission of unlawfully seized evidence. That argument has much to commend it. A person who has done an unlawful act is liable to punishment. However, unless we view the performance of the unlawful act as removing the offender from society, punishment is only properly inflicted in accordance with the rules that surround the institution of punishment. If the rules of the institution are violated, the punishment is not lawful. One of the conditions that surrounds the institution of punishment in the United States is the limitation of the mode of evidence gathering in the Fourth Amendment. If that limitation is violated and the fruits used, a defendant may complain that a wrong has been done him. Even though he is deserving of punishment, he is deserving only of lawful punishment. The state has set up the institution of punishment. It has defined the conditions upon which punishment may be inflicted. It then proceeds to punish in violation of those conditions.

In some respects, a defendant's situation is analagous to that of the man who has committed a crime and then suffers extra legal punishment. A guilty man lynched suffers a wrong, even though his execution by the State after a fair trial would be proper.

In practice, it might be difficult to separate mere errors in procedure in an otherwise lawful infliction of punishment from fundamental violations of process that makes punishment unlawful. However, the Constitution circumvents this problem by imbedding certain processes in a fundamental set of rules, which must be then treated as central to the institution of lawful punishment. See, Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251 (1974).

legal system depends on citizen cooperation for its operation. Law derives its binding force and secures that cooperation, "more from its claim to embody society's concept of justice than from its threat of penalties." Potter, *History and American Society*, (1974) p. 405. Much of that claim would be lost if government came to be perceived as law breaker. "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio*, supra 367 U.S. 659.

> "The importance of police to our legal process can hardly be over-estimated. The police are the interpreters of the legal order to the population; indeed for many people, they are the sole source of contact with the legal system . . . So what the policeman does is often perceived as what the law is, and this is not an inaccurate perception." Skolnick, *The Politics of Protest: A Report to the National Commission on the Causes and Prevention of Violence.* (Ballantine, 1969), p. 269.

Since many perceive the legal system solely in terms of police conduct, a perception of the police as law breakers leads to perception of the legal system as lawless. ". . . Loss of faith in the authority of the law may move rational persons toward extra legal action." Skolnick, *The Politics of Protest*, p. 325.

To assure that those who have governmental power exercise it in accordance with law, the possessors of power must be made responsible for their uses of that power. Responsibility is assured, when the possessors of power are required to give a legal justification for their actions. American public law secures responsibility in large measure through the device of judicial review. Those who exercise discretion must exercise it in accord

with law, and reviewability is presumed in order to assure that they do so. *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967). In the judicial forum, a citizen may challenge exercise of authority against him, and those who have exercised the authority are required to demonstrate their legal justification. Police officers, "engaged in the often competitive enterprise of ferretting out crime," *Johnson v. United States*, 333 U.S. 10, 14 (1948), are unlikely candidates to be granted unreviewable discretion. "[T]he policeman frequently loses the ability to distinguish between law and license in himself." Niederhoffer, *Behind the Shield: The Police and Urban Society*, pp. 64-65.

> "[A]t first impression it would appear that above all other groups the police ought to be tied to the law, but because they learn to manipulate it, the law can become nothing but a means to an end. In performing his special role in the social system, the policeman realizes that for much of his time on duty he is above the law. Paradoxically, society has granted him the license to disregard the law in order to enforce it. He may kill where necessary, he may destroy property and invade privacy; he may make arrests merely on the grounds of suspicion; he may disregard traffic regulations. The sense of power often corrupts him into a belief that he is superior to the law." Niederhoffer, op. cit., p. 97; Skolnick, *The Politics of Protest*, p. 270.

However, abolition of the exclusionary rule would leave police conduct with regard to arrests and searches and seizures outside the control of the judicial process.

The police are dependent upon community cooperation for effective functioning. This cooperation is only forthcoming when the police are perceived as instru-

ments of law rather than aggressors. Reiss, *The Public and The Police*, pp. 69-70, 175.

> ". . . Police are not supposed to adjudicate and punish; they are supposed to apprehend and take into custody. To the extent to which a nation's police step outside such bounds, that nation has given up the rule of law in a self-defeating quest for order." Skolnick, *The Politics of Protest*, p. 249.

When the police step beyond the bounds of law, they lose their claim to legitimacy. Legitimacy being absent, force and violence become the only techniques of law enforcement.

The exclusionary rule, to the extent it secures police compliance with the Constitution, vindicates the laws "claim to embody society's concept of justice." The stronger that claim, the more likely voluntary obedience to the law's commands. The exclusionary rule, to the extent it secures police compliance with the Constitution, preserves the police officers claim to legitimacy.

> "Lest any one conclude that the dependence of a civil police on a civil society is a license for the police to misbehave, it should be clear that it is the responsibility of government in a democratic society to insure that its servants behave in a civil fashion. The police are not only obligated to behave in a civil way towards citizens but their behavior is strategic in changing relations between citizens and the police. To the degree that we can develop civility in police relations with citizens, we move toward a civil society." Reiss, *The Police and The Public*, p. 221.

The exclusionary rule achieves these goods only imperfectly. That, however, is an unsurprising comment on a human institution.

Whatever the merits or demerits of the exclusionary rule, it is the sole protector of Fourth Amendment rights. Its abolition prior to the creation of a new guardian creates intolerable dangers. As the Chief Justice observed in his dissenting opinion in *Bivens v. 6 Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-421 (1971):

> ". . . In a sense our legal system has become the captive of its own creation. To overrule *Weeks* and *Mapp*, even assuming that Court was now prepared to take that step, could raise yet new problems. Obviously the public interest would be poorly served if law enforcement officials were suddenly to gain the impression, however erroneous, that all constitutional restraints on police had somehow been removed–that an open season on 'criminals' had been declared. I am concerned lest some such mistaken impression might be fostered by a flat overruling of the suppression doctrine cases. For years we have relied upon it as the exclusive remedy for unlawful official conduct; in a sense we are in a situation akin to the narcotics addict whose dependence on drugs precludes any drastic or immediate withdrawal of the supposed prop, regardless of how futile its continued use may be."

The second danger is related to the first. The exclusionary rule is unpopular with the public. Yet, that unpopularity paradoxically is an expression of public faith in the values the Fourth Amendment protects. In a large measure, the public call for "law and order" reflects a fear that people are no longer safe in their own homes. While abolition of the exclusionary rule might aid in quieting these fears, abolition without appropriate alternative could replace the fear of intrusion by a wrongdoer by fear of unwarranted intrusion by the police. When the home is no longer

perceived as a sanctuary, it is no longer a home.

Since no alternative to the exclusionary rule is now in place, we cannot do without the rule. Since the exclusionary rule is not to be abolished, proposed modifications of the rule must be examined against the backdrop of a continuing need for the exclusionary sanction. If a proposed modification substantially interferes with the rule performing its functions as sanction for the Fourth Amendment, that modification should be rejected.

The description of the exclusionary rule as a sanction of a sanction is to deter future wrongful conduct by setting the price of wrongdoing higher than its benefits. Posner, *Economic Analysis of Law*, p. 7. This function has been emphasized by the Court. See, e.g. *Brown v. Illinois*, 43 Law Week 4937, 4940 (1975). Since searches in criminal cases are undertaken to procure evidence, the advantage of unlawful search is nullified when admissibility is denied. This Court has also emphasized the role of the exclusionary rule in the preservation of judicial integrity. See, e.g. *Brown v. Illinois*, supra. Most obviously, judicial integrity is served when the courts refuse to become parties to an unlawful search by admitting its fruits. But more than this is involved in the concept of judicial integrity. That function is intimately related to what we have referred to as the preservation of legality. A legal rule honored only in the breach loses its character as law. When a court rejects unlawfully seized evidence, it preserves the Fourth Amendment. It reannounces that the Fourth Amendment is part of the Constitution, and that the values contained in the Fourth Amendment are worth preserving. It speaks on behalf of the legal system to authoritatively disavow the unlawful act. While the

policeman purported to act in the name of the law, he went beyond his authority, and that excess of power is condemned. See, Feinberg, "The Expressive Function of Punishment," in *Doing and Deserving*, pp. 101-104.

We turn then to an appraisal of the impact of Nebraska's proposed modifications upon the functioning of the exclusionary rule. We lay heavy emphasis upon the factor of deterrence, since that has bulked so large in this court's recent discussions of exclusion. However, any modification of the rule which lessens its deterrent impact or makes unlawfully seized evidence generally admissible entrenches upon the integrity of the judiciary and the legitimacy of the legal system by refusing to condemn actions in violation of the Constitution.

A. To Make the Operation of the Exclusionary Rule Depend Upon the Absence of Good Faith on the Part of Police Officers Would Substantially Diminish the Deterrent Effect of the Exclusionary Rule. In any Event, the Evidence Here Does not Demonstrate That the Police Acted in Good Faith.

Nebraska argues that (1) evidence should not be suppressed even though a search was unlawful if the police were proceeding in good faith at the time that the search was made. Brief of petitioner, pages 23-26; 35-38. We will demonstrate that any change from the current standard of strict liability that now obtains in search and seizure cases would substantially diminish the deterrent effect of the exclusionary rule. Since this Court is committed to the premise that modifications or extensions of the exclusionary rule should be

measured by their impact upon future police conduct, such a demonstration renders a good faith standard untenable. *Brown v. Illinois*, 43 Law Week 4937, 4941 (1975); *United States v. Peltier*, 43 Law Week 4918, 4921 (1975); *Michigan v. Tucker*, 417 U.S. 433, 447 (1974); *United States v. Calandra*, 414 U.S. 338, 348 (1974).

In analyzing the impact upon deterrence of the adoption of a good faith standard, it is important to set to one side cases such as *Michigan v. Tucker, supra*, and *United States v. Peltier, supra*, which have dealt with the question of whether changes in constitutional standards should be retroactively applied to conduct lawful when engaged in, but rendered unlawful by subsequent decisions. When liability is absolute, that is, when sanctions are imposed without regard to conduct, for example random punishment, deterrence is rendered nil. Since compliance or non-compliance is irrelevant to punishment, there is no advantage in complying. Posner, *Economic Analysis of Law*, p. 369. Retroactivity cases have been designed to avoid this problem of absolute liability. Retroactive application of change standards would tend to induce in the police the belief that their conduct is irrelevant to suppression or non-suppression. If the police view the judicial process as random, the suppression remedy would be no deterrent. However, allowing officers to maintain the fruits of their searches, if they were lawful when made, awards compliance with existing standards. Therefore, the denial of the suppression remedy in retroactivity cases functions as an encouragement to compliance, and hence as a deterrent to violation.

This analysis cannot be carried over to a case where the officer violates existing standards. In such a case, the standard existed prior to its conduct, and was

therefore a standard of which the officer could have known. If despite the knowability of the standard the officer's subjective good faith is used as a measuring stick, constitutional rights become variable with the abilities of the particular officer in the case. Then, the officer who made the least effort to master constitutional standards would run the least risk of suppression. Even with the application of a negligence standard, where the knowledge required of the officer would be measured by the objective standard of what a reasonable police officer should know, Restatement Torts, 2nd, Sec. 12 (2), deterrence would be diminished. Since the standard would depend on the facts of each particular case, the officer would have a strong inducement to act, without regard to his actual knowledge of standards, in the hope that he could persuade a court later that his action was reasonable.

The breach of constitutional rights to be deterred is never the one involved in the suppression proceeding. That violation has already taken place. *Elkins v. United States*, 364 U.S. 206, 217 (1960), Posner, *Economic Analysis of Law*, p. 7. From the point of view of deterrence, the importance of imposition of sanctions in a particular case is the effect of those sanctions on future conduct. When a sanction is imposed, those who impose the sanction demonstrate that they care enough about the norm violated to act upon its behalf and to attempt to maintain it. Hence, the norm is both demonstrated and reinforced. Those who might violate a norm are warned in advance of what the norm is and are told that it is important enough that a violation will be accompanied by sanctions. The threat of sanctions makes the violation of the norm potentially more costly than it otherwise would be, and "by thus altering the

prices that confront people, the warning may affect their behavior . . ." Posner, *Economic Analysis of Law*, p. 7.

If police agencies are interested in convictions, then exclusion should be an effective sanction against unlawful police conduct. Posner, *Economic Analysis of Law*, p. 384; Skolnick, *Justice Without Trial*, (2d ed.), p. 224. However, the deterrent effect of the suppression remedy is diluted to the extent that the police, when they decide whether or not to violate the standards of the Fourth Amendment, can anticipate the procedures for determining whether or not to apply the remedy will miscarry. Posner, *Economic Analysis of Law*, p. 333.

Clearly, if deterrence is the purpose of the exclusionary rule, a subjective good faith standard is disqualified. As we have already noted, it leaves the protection of constitutional rights variable with the abilities of the individual police officer. It "would leave so vague a line as to afford no rule at all, the degree of judgment belonging to each individual being infinitely various . . ." *Vaughn v. Menlove*, 3 Bing. (N.C.) 468, 475, 132 Eng. Rep. 490, 493 (1837). In addition, since all the officer need do to save the fruits of his search is to convince the judge that he did not know that he was doing wrong, a subjective standard creates a strong motive for the officer to search whenever he thinks there is a gain from searching, and later manufacture a story which justifies the search. See, Reiss, *The Public and The Police*, pp. 133-134; Skolnick, *Justice Without Trial* (2d ed.), p. 215; Oaks, *"Studying the Exclusionary Rule in Search and Seizure."* 37 U. Chi. L.R. 665, 696-699, 739-742 (1970). As Skolnick notes:

> ". . . the policeman respects the necessity for 'complying' with the arrest laws. His 'compliance' however, may take the form of manipulation of the facts rather than before the fact behavior . . . but when he sees the case law as a hindrance to his primary task of apprehending criminals, he usually attempts to construct the appearance of compliance, rather than allow the offender to escape."

If this type of situation has existed, and has hindered the work of the exclusionary rule applied objectively, its impact under a subjective standard would totally devastate the effectiveness of the exclusionary rule.

However, neither *Michigan v. Tucker*, nor *United States v. Peltier*, adopted a subjective good faith standard. Rather, each of those cases adumbrated the utilization of a negligence standard. Thus in *Peltier* the court stated:

> "The teaching of these retroactivity cases is that if the law enforcement officer *reasonably* believed in good faith that evidence they had seized was admissable at trial, the 'imperative of judicial integrity' is not offended by the introduction into evidence of that material even if decision subsequent to the search or seizure have broadened the exclusionary rule to encompass evidence seized in that manner . . ." 43 L. Wk 4920.

and at a later point the court stated:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officers had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the 4th Amendment . . ." 43 L. Wk 4922.

While the negligence standard suggested by these cases is not so ineffectual as a subjective good faith standard, it suffers from the same vice. That is the variability of result produced by the standard serves as an inducement to unlawful conduct.

In strict liability cases, such as the current application of the exclusionary rule, the focus is on the actual conduct engaged in. Was the result of that conduct in compliance with the norm or not? In negligence, with an objective standard, the focus is not solely on the end result of conduct. Even if the end or result is unsatisfactory, if the party who acted cannot reasonably be expected to have acquired knowledge that his conduct might miscarry, then the failure to achieve the end will not condemn the conduct. Compare, Restatement Torts 2d, Sec. 388 and Sec. 402 A.

Strict liability has a greater deterrence potential than negligence. Strict liability reduces uncertainty about the results of the sanction applying process, and hence increases the certainty that sanctions will be applied on violations of norms. Posner, *Economic Analysis of Law*, p. 342. Strict liability encourages those engaged in conduct subject to its standards to avoid areas of potential liability. See, *Gertz v. Welch*, 418 U.S. 323, 339-341 (1974).

In negligence cases, since the result is less predictable than in a strict liability case, the dilution of deterrence that results from variability of standard in subjective good faith cases also obtains. In addition, the application of a negligence standard in cases involving police conduct would be fraught with special difficulties. In most cases where a negligence standard is applied to those with special skills, such as the police,

expert evidence is required to prove the standard. Restatement Torts 2d, Sec. 292A; Prosser, Torts 4th, p. 161. How a defendant in a criminal case could elicit such expert evidence to define the standard is difficult to conceive. The mores of the police are against testimony.

> "The subcultural norm against testifying or informing against a fellow officer is one of the strongest in the subculture, holding as strongly for internal as for external investigations. The subculture price for violating the norm is absolute exclusion from the informal life of officers and refusal by all officers to work with the officer who would 'cop out'. The latter was the devastating effect of getting superiors to carry out this ultimate punishment of banishment by ordering removal of the officer for 'failure to get along with his fellow officers.' Indeed, it is as unlikely for one police officer to testify against another as it is for one student to testify that another has cheated in a classroom situation . . ." Reiss, *The Public and The Police*, p. 213; Cf Niederhoffer, *Behind The Shield*, p. 69;

Thus, a conspiracy of silence situation analogous to that which long obtained in medical malpractice cases would be created. See, Amsterdam, "Perspectives on the 4th Amendment," 58 Minn. L.R. 349, 430 (1974).

Alternatively, the courts could be left free to craft a standard of knowledge which they believe the police should meet, without regard to the actual level of knowledge obtained by policemen. However, this approach would either lead to a case by case evaluation or to a return to substantially the place where we are not in the application of the exclusionary rule.

One approach to the application of the reasonableness standard would be to attempt to determine in the

particular case what level of knowledge should be required of police officers and to return suppression upon that level of knowledge. "This approach would lead to unpredictable results and uncertain expectations, and could render our duty to supervise the lower courts' unmanageable" *Gertz v. Welch, supra,* 418 U.S. 343. As Professor Amsterdam has noted:

> "The problem with the graduated model, of course, is . . . that . . . it converts the fourth amendment into one Rorschach blot. The complaint is being voiced now that the fourth amendment law is too complicated and confused for the policeman to understand or to obey. Yet present law is a positive paragon of simplicity compared to what a graduated fourth amendment would produce. The varieties of police behavior and of the occasions that call it forth are so enumerable that their reflection in a general sliding scale approach could only produce more slide than scale. We would shortly slide back to the prescription stated in a now overruled 1950 decision of the court which is generally regarded as the nadir of fourth amendment development; That '. . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case.' Under that view, (R)easonableness is in the first instance for the (trial court) . . . to determine' What it means in practice is that appellate courts deferred to trial courts and trial courts defer to the police. What other results should we expect? If there are no fairly clear rules telling the policeman what he may and may not do, courts are seldom going to say that what he did was unreasonable. The ultimate conclusion is that 'the people would be "secure in their persons, houses, papers, and affects" only in the discretion of the police.' And as Mr. Justice Jackson reminded us, 'the extent of any privileges of search and seizure without

> warrant which we sustain, the officers interpret and apply themselves and will push to the limit." *Perspectives on the 4th Amendment,* supra 58 Minn. L. R. 393-394.

Alternatively, the reasonableness analysis might be reserved for those cases where the law was so unclear or the situation so novel, that only the actual decision in the case settled the issue. This would be analagous to the rule applied in *Wood v. Strickland,* 43 L. Wk. 4293, 4298 (1975) that:

> "The official must be acting sincerely and with the belief that he is doing right, but an act violating a student's constitutional rights can be no more justified by ignorance or disregard of settled, indisputable law on the part of one entrusted with supervision of students' daily lives than by the presence of actual malice. To be entitled to a special exemption from the categorical remedy language of section 1983 in a case in which his action violated a students' constitutional rights, a school board member who has voluntarily undertaken the task of supervising the operation of the schools and the activities of the students must be held to a standard of conduct based not only on permissible intentions, but also on a knowledge of the basic unquestioned constitutional rights of his charges . . ."

The *Wood v. Strickland* approach would solve some of the problems of variability of standard. However, it is difficult to see what is gained by this approach. In essence, it returns us to the strict liability approach now taken in suppression cases. In a marginal number of cases, searches might be saved on the grounds that the law was unclear or the question novel. However, the price of saving these searches would be the injection of this new issue into suppression hearings, with the

debate raging not about the legal merits of the case, but about how clear the merits were before the case was decided.

The current strict liability approach does catch within its net certain cases where the deterrence rationale might be inapplicable because of the confused state of the law. However, this type of overbreadth is an unavoidable concomitant of the formulation of rules. As the court noted in *Gertz v. Welch:*

> "... because an ad hoc resolution of the competing interest at stake in each particular case is not feasible, we must lay down broad rules of general application. Such rules necessarily treat alike various cases involving differences as well as similarities. Thus, it is often true that not all of the considerations which justify adoption of a given rule will obtain in each particular case decided under its authority." 418 U.S. 343-344; cf. *Dandridge v. Williams,* 397 U.S. 471, 485 (1970).

If the exclusionary rule is to be maintained, and the purpose of exclusion is deterrence, then that purpose is best served by continuing the strict liability approach in suppression proceedings. Any other approach, except possibly the *Wood v. Strickland* approach, substantially diminishes the deterrent effect of the exclusionary rule. The *Wood v. Strickland* approach, would not be worth its cost. It would render the suppression process more complex, without any notable benefit to the police.

In addition to its deterrence function, the exclusionary rule has also been justified because of "the imperative of judicial integrity," *Elkins v. United States* 354 U.S. 206, 222 (1960). This imperative strongly counsels against any modification of the current standards for determining exclusion. Either a subjective

standard or a negligence test of good faith offers the police a substantial inducement to tailor their testimony to assure admission. Where mind states are involved such tailoring is easiest. The evidence is that the police will accept such opportunity. Non-suppression because of prevarication will by example encourage other officers to emulate those involved in the case where suppression was denied. Hence, the modified standards would encourage violation of constitutional rights. Here, the notion of judicial integrity becomes crucial. If the courts are sworn to uphold the constitution, at a minimum, this would suggest that it is not their function to encourage the invasion of constitutional rights.

(2)

In any event, the application of good faith standard in this case would not save the search. This court has already indicated that if a good faith standard is to be utilized, it will be an objective standard. *United States v. Peltier, supra,* 43 L. Wk. 4920-4922; *Michigan v. Tucker, supra*, 417 U.S. 447; cf *Scheuer v. Roads,* 416 U.S. 232, 247-248 (1974); *Wood v. Strickland, supra*, 43 L. Wk. 4296-4298. Under such a standard, suppression would only be denied when the police entertained a reasonable belief that they were acting in conformity with constitutional standards. No such reasonable belief was present in this case.

Both the trial court and the court of appeals found that the police did not have probable cause to believe that either seizable things or a person they were seeking were within Rice's house. The requirement of probable

cause is not a novel doctrine of which the police could be ignorant.

> ". . . all members of the police department, from the commissioner down to the raw recruit, are expected to be familiar with the principle that if the police intend to conduct a search of a man's home for a suspect, they must at least have probable cause to believe that he is on the premises. The doctrine is not subtle; it touches the very heart of law enforcement practices, and has found expression in numerous judicial opinions . . ." *Lankford v. Gelston*, 364 F.2d 197, 203 (4th Cir. 1966).

Probable cause exists when the quantum of facts is such that it would "warrant a man of reasonable caution" in a belief. *Carroll v. United States*, 267 U.S. 132, 162 (1925). Built into the concept of probable cause is a broad leeway for the police defined by the zone of reasonable belief. *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949); *United States v. Ventresca*, 380 U.S. 102, 108 (1965); *McCray v. Illinois*, 386 U.S. 300, 304-305 (1967). Thus, when the courts below found that the police lacked probable cause, they found that the police could not have reasonably believed that things which they sought were on the premises which they searched.

The police knew or should have known that they were required to have probable cause before they entered the premises to search. They did not have probable cause. They could not therefore, have entertained a reasonable belief that their entry was proper. Thus, under an objective good faith standard the search here was improper. The officers did not entertain a reasonable belief that dynamite would be found on Rice's premises or that Duane Peak was

secreting himself there. The police did not expect to find either dynamite or Peak at Rice's house. All they had was hope.

Lt. Swanson, the officer who obtained the search warrant, testified:

> "Well, one thing that had been troubling me all day, since the search of the Black Panther headquarters is that there was dynamite some place but we hadn't been finding it, and so it occurred to me at this time, a decision was made right there. I said 'Why don't we check this house for Duane Peak and we may find dynamite or something in there; and maybe we ought to see if we have the grounds that we can put together a search warrant.' That was about our thinking on that." (App. 43.)

Swanson's testimony provides a total answer to the application of any good faith exception concerning the presence of dynamite on the premises. In obtaining and executing the warrant, Swanson was not operating on a strong, subjective belief that he was complying with Constitutional requirements. Rather, he was trying to cover his case. He had no belief that dynamite was on the premises. However, if he got lucky and found dynamite, he wanted to be able to use it as evidence.

The situation concerning the expectancy that Peak would be found on the premises is identical. Lt. Swanson gives a full explanation of what brought the police to the residence at 2816 Parker Street. He testified that the police had knowledge that Peak, whom they were seeking, was a member of the NCCF. Rice was also a member of that organization. His house had been a periodic meeting place for NCCF members. (App. 15-16.) Peak was one of the members of that organization who had visited at Rice's house. (App. 26-27.)

The police had constructed a list of different places where Peak might be. As Lt. Swanson testifies:

> "At the time we had a list of houses as possibilities, plus getting new addresses from informants . . ." (App. 40.)

After the search of the NCCF headquarters, the large number of officers who had converged there were subdivided into smaller parties and were instructed by Lt. Perry to "proceed with their previously assigned houses." (App. 71-72.) As Lt. Swanson described the instructions, there were orders "To go to the known places of the NCCF and attempt apprehension of Duane Peak." (App. 35.)

The police testimony makes it clear that they did not believe that Peak was at 2816 Parker. Rather, they were conducting searches of a large number of places in the hope that they might find Peak. Thus, Lt. Swanson testifies:

> "Question. Did you have any report from anyone that Duane Peak was then inside the Rice house or had been inside the Rice house that day?
>
> Answer. No, sir. The only thing we had was a speculation because it was a known house of that particular group and he was a member of that group and it was a place where he might possibly be." (App. 44.)

He was specifically queried about information that Peak might have been in Rice's house within the last few days before entry. He testified that:

> "Question: At the time you made the search of the Rice house did you have any information from anyone as to where Duane Peak had actually been within the last day or two before your entry into the Rice house?

> Answer. I don't recall.
>
> Question. Now, was there anything that you now can recall to tie Duane Peak to the Rice house at the time you made the entry into the house other than your information that Duane Peak was a member of the NCCF, that David Rice was also a member of the NCCF, that Peak had been known to go to that house for meetings and otherwise? Now anything else?
>
> Answer. No that was about the information we had." (App. 44-45.)

Similarly, both Lt. Pfeffer and Lt. Perry, the other command officers who testified in federal court, had no specific information that Peak might be at Rice's house. (App. 66-67; 75.)

Lt. Swanson's testimony demonstrates that the police did not believe that Peak was at Rice's premises. If anyone would have had information linking Peak with those premises, it would have been Swanson, who commanded the intelligence unit (App. 15). It is clear from Pfeffer's testimony that he had no specific information about a relationship between Peak and Rice, but was merely relying on information provided by the intelligence division. Lt. Perry had seen Peak and Rice together, but that was six months before the event in question, when he served in the intelligence division. (App. 75-76.)

The police testimony shows that other probable hiding places of Duane Peak had not been eliminated when Rice's house was searched. Only three prior searches are mentioned. The search of the NCCF headquarters, the search of the home of one of Peak's uncles and a search of Poindexter's home. There is no evidence the police were working through a list of

places on the basis of an order of probability. The police did not know where Peak was. They knew he must be someplace. Their strategy was to search everyplace.

On the basis of the foregoing testimony, the Court of Appeals noted that:

> "... The testimony of the various police officers at the evidentiary hearing held before the District Court strongly suggests that the police had no evidence whatever that Peak was at petitioner's house and that *they were acting on nothing more than a hunch or random guess*. . ." 513 F.2d 1292 (Emphasis supplied.)

Again with regard to the search for dynamite the Court of Appeals states:

> "... Moreover, testimony before Judge Urbom suggests that *the purpose of searching for the explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered the dynamite in any of the other locations they had searched earlier in the day.*" 513 F.2d 1295 (Emphasis supplied.)

The Court of Appeals held that the State's good faith argument was not only legally invalid, but factually unsupported.

> "We consider it necessary to point out that the record discloses a widespread search for the suspect Peak and Poindexter which evinced at least a negligent disregard by the Omaha Police for Constitutional rights of not only petitioner but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct

> condemned in *Lankford v. Gelston*, supra. We believe this is an appropriate case for the application of the exclusionary rule." 513 F.2d 1295.

B. To Allow Supplementation of a Defective Affidavit for a Search Warrant in a Subsequent Hearing on a Motion to Suppress Would Amount to an Elision of the Warrant Clause From the Fourth Amendment. In any Event, the Additional Information Upon Which Nebraska Relies Does Not Establish Probable Cause.

Nebraska argues that the police should be allowed to supplement a defective affidavit for a search warrant at a hearing on a motion to suppress. Brief of petitioner, pp. 41-44. Underlying this argument is the premise that the police demonstrate their good faith and allegiance to the Fourth Amendment whenever they seek a warrant. Therefore, suppression without examination of the cause which they in fact had is in fact unwarranted. Brief of petitioner, pp. 23-24.

The argument for supplementation of a defective affidavit completely ignores the warrant clause of the Fourth Amendment, and hence the central role which the magistrate plays in the protection of Fourth Amendments rights. Nor, is an inference of good faith warranted merely because a police officer seeks a warrant. This alteration of the exclusionary rule suggested by Nebraska would not serve the ends of the Fourth Amendment. Further, Nebraska's position that supplementation of the affidavit would save the search here is factually incorrect. The additional information

produced in the state court herein on the motion to suppress does not demonstrate the existence of probable cause to believe that dynamite was on the premises of 2816 Parker.

(1)

The second clause of the Fourth Amendment, the warrant clause, spells out the circumstances under which a magistrate may issue a search warrant. The second clause has been read as modifying the general mandate of the first clause against "unreasonable searches and seizures." Searches conducted outside the judicial process, that is, without the prior approval of a judge or magistrate, are treated as per se unreasonable under the Fourth Amendment, subject only to specific exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). The exceptions deal in the main with cases in which time is too short for officers to procure a warrant. *Roaden v. Kentucky*, 413 U.S. 496, 505 (1973); *Coolidge v. New Hampshire*, 403 U.S. 443, 462 (1971). This requirement that, "where practical, a governmental search and seizure should represent both the efforts of the officer to gather evidence of wrongful acts and the judgment of the magistrate that the collected evidence is sufficient to justify invasion of a citizens private premises or conversation" is "the very heart of the Fourth Amendment directive." *United States v. United States District Court*, 407 U.S. 297, 316 (1972).

This Court has often explained why the judgment of the magistrate plays such a centra role in the Fourth Amendment scheme. Thus in *Johnson v. United States*, 333 U.S. 10, 13-14 (1948), the court stated:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferretting out crime." Cf *Gerstein v. Pugh*, __U.S.__ 43 L.Ed 2d 54, 64 (1975).

The requirements that the magistrate's judgment precede action takes on added significance when it is examined against the totality of the Constitution. The Constitution proceeds on the principle that the greatest safeguard against misuse of power is division of authority. If different persons have to cooperate before power can be exercised, then it is less likely to be abused.

> ". . . The awful instruments of the criminal law cannot be entrusted to a single functionary. The complicated process of criminal justice is therefore divided into different parts, responsibility for which is separately vested in the various participants upon whom the criminal law relies for vindication." *McNabb v. United States*, 318 U.S. 332, 343 (1943).

The due process clauses of the Fifth and Fourteenth Amendments are read as requiring, in the absence of an emergency, *Fahey v. Mallonee*, 332 U.S. 245 (1947), that governmental action which significantly invades personal or property rights be proceeded by some type of hearing. See *Nickey v. Mississippi*, 292 U.S. 393 (1934); *Op Cotton Mills v. Administrator, Department of Labor*, 312 U.S. 126 (1941). Under recent decisions of this court, process that results in the seizure of property is required to be preceded by judicial action

and cannot become final absent adversary process. *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Fuentes v. Shevin*, 407, U.S. 67 (1972); *Mitchell v. W. T. Grant Co.*, 416 U.S. 600 (1974); *North Georgia Finishing, Inc. v. Di-Chem, Inc.*, __U.S.__, 42 L.Ed. 2d 751 (1974). In the case of a search warrant the Fourth Amendment defines due process. *Gerstein v. Pugh*, supra, 43 L.Ed. 2d 72, n. 27. However, the due process cases strongly counsel against removal of the threshold requirement of judicial approval prior to search or seizure. *Mitchell v. W. T. Grant Co.*, supra.

If the magistrates' role is to be meaningful, the justifications of the search must be limited to the information presented to him. If that information can be supplemented, the procurement of the warrant becomes a ritual, and the magistrate is reduced from judge to ceremonial figure. Since the requirement of the warrant derives directly from the second clause of the Fourth Amendment, the limitation of the justification to the information presented to the magistrate is bottomed in the Fourth Amendment. Thus, modification of the exclusionary rule to allow supplementation amounts to modification of the Fourth Amendment.

(2)

The mere fact that the police obtain a warrant does not demonstrate that a subsequent search is performed in a good faith belief that it complied with constitutional standards. The police are responsible for the contents of the affidavit upon which the warrant issued. They have at least a rudimentary familiarity

with the requirements of probable cause. Experienced policemen know their judges, and the police select the magistrate to whom the affidavit goes. Thus, good faith cannot automatically be assumed because a warrant is issued.

The magistrate need not be a lawyer, *Shadwick v. City of Tampa*, 407 U.S. 345 (1972), and therefore, there is no guarantee that the magistrate will be better positioned than the police officers to make a legal judgment on the sufficiency of the affidavit. While the magistrate may be less zealous than the police, he may be no better informed. When the magistrate is a lawyer, generally he is a judge of an inferior court. This court has had occasion to comment on the heavy burden borne by misdemeanor courts, *Gerstien v. Pugh*, supra 43 L.Ed. 2d 70 n. 23; cf. Skolnick, *The Politics of Protest*, pp. 308-310. These busy judges probably have much less time to devote to examining the warrant, then the police do to preparing it. cf. Skolnick, *The Politics of Protest*, pp. 309-310. There is substantial evidence of a "pervasive tendency of magistrates to rubber stamp police warrant applications without adequate independent inquiry." Amsterdam, op. cit., Fourth Amendment, 58 Minn. L. Rev. 471, n. 32, and authorities there cited. Where more than one magistrate is available, even if most magistrates take seriously their responsibilities, the police can shop for their forum.[3]

---

[3]As we have already noted there is substantial police evidence of prevarication in search and seizure cases. Allowing supplementation of an affidavit would merely exacerbate this problem. "At least a presearch affidavit in support of a warrant application ordinarily deprives the officer of the benefit of hindsight after the search produces evidence in support of itself." Amsterdam, op. cit., Fourth Amendment. 58 Minn. L. Rev. 471-472, n. 532.

There is an additional value served by the requirement of demonstration of cause prior to search. There is always the

An alternative version of the good faith argument would allow admission of any evidence seized pursuant to a warrant, on the grounds that the police have established their good faith in obtaining the warrant. *Brown v. Illinois*, supra, 33 L. Wk. 4944 (concurring opinion). However, as we have already demonstrated, an inference of good faith cannot immediately follow from the fact that a warrant was obtained.

If issuance of the warrant made admissibility automatic, magistrates would be under a tremendous pressure to approve all warrants. While some would resist such pressure, judges in the inferior criminal courts deal with the police on a day to day basis. They become very sympathetic with the policemen's problems. Some of them view themselves as an arm of law enforcement, rather than as detached judicial officers. Skolnick, *The Politics of Protest*, pp. 313-316; Chevigny, *Police Power*, pp. 250-252. Given these pre-existing tendencies, many would accept the oppor-

---

danger that overzealous officers, unable to prove a case against the party they believe guilty, may seek to manufacture it by planting evidence. The requirement that cause be demonstrated prior to access to premises limits the chances of such misconduct.

In a supplemental brief he filed in the Nebraska Supreme Court and in a supplemental petition for habeas corpus, David Rice maintained his innocence and contended that his arrest, trial and conviction were politically motivated. The fact that the police investigation focused on Rice because of his political views lends credence to this charge. In a case such as this, where the police decided that Rice was involved and then sought evidence of involvement, and where the emotions of all members of the Omaha Police were deeply involved because a brother officer had been killed, the likelihood of improper police action is increased. The requirement of prior demonstration of cause serves as a partial check upon such improper action.

tunity to approve warrants simply because it would promote admissibility. The current rule inhibits such tendencies. The magistrate knows that approval of a defective warrant is superfluous. Thus the current rule tends to force the magistrate to perform his judicial task, even if he doesn't like it.

If the magistrate's ruling is final, would not the arguments that due process cases should not be applied in the search and seizure context because the Fourth Amendment defines due process collapse? If it did, then it would appear that, in the absence of an emergency, the party whose property was to be searched would be entitled to an opportunity to appear and contest the showing of probable cause. If such opportunity were not granted, this would leave personal rights guaranteed by the Fourth Amendment and property rights in land invaded and things seized with substantially less protection than is generally accorded property under the due process clauses of the Fifth and Fourteenth Amendments. Moreover, the procedure to grant the warrant, since it would not be unreviewable, might be a critical stage in the proceedings. See *United States v. Wade*, 388 U.S. 218, 226-227 (1967). While a critical stage argument might be avoided, either on the grounds that an unlawful search does not interfere with "the accused's right to a fair trial," *United States v. Wade*, supra, 388 U.S. 226, or, in cases in which charges have not yet been filed, on the grounds that adversary judicial proceedings have not yet been initiated, *Kirby v. Illinois*, 406 U.S. 682 (1972), this would create a situation in which vital personal rights of the accused were invaded without giving him the opportunity to be heard or to have counsel present.

In the net, if a search is validated whenever a magistrate approves it, the warrant becomes "a 'cure all' and the Constitutional guarantee against unlawful search and seizure could be said to be reduced to 'a form of word.' " *Brown v. Illinois*, supra, 43 Law. Wk. 4941.

Finally, there is a general point which we believe must be made about any modification of the exclusionary rule. All of the cases, which have advanced the good faith rationale, have dealt either with collateral uses of the tainted evidence, with inadmissibility in the case in chief, or with retroactivity problems. See, *United States v. Calandra*, supra; *Michigan v. Tucker*, supra; *United States v. Peltier*, supra. More generally, when this Court has discussed the efficacy of deterence, it has done so in the context of requests for extension of an exclusionary rule. *United States v. Calandra*, supra; *Harris v. New York*, 401 U.S. 222, 225 (1971); *Oregon v. Hass*, __U.S.__ 43 Law Wk. 4417, 4420 (1975). Where extensions of such rules are involved, "assuming that the exclusionary rule has a deterrent effect on prescribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris v. New York*, supra. However, where a retrenchment on an exclusionary rule is proposed, the context significantly varies. The impact of a retrenchment on police conduct will largely depend upon police perception of the motivation of the retrenchment. A significant modification of the exclusionary rule could leave law enforcement officials with "the impression, however erroneous, that all Constitutional restraint on police had somehow been removed–that an open season on 'criminals' had been declared." *Bivens v. 6 Unknown Federal Narcotics Agents*, 403 U.S. 388, 420-421

(1971) (dissenting opinion). This likely misperception would leave the deterrent value of the residue of the exclusionary rule nil.

(3)

The additional information presented in the state court suppression hearing demonstrated that the tip on which the police acted was even less substantial than the affidavit indicated. In addition, it demonstrated that the tip was stale. None of the additional facts presented in the suppression hearing went to establish the presence of seizables at Rice's residence.

The District Court had available to it the testimony in the state court. With regard to the additional evidence concerning the tip, a matter to which the Nebraska Supreme Court did not avert, the district court noted:

> ". . . The source of their information concerning the presence of dynamite in David Rice's house was a tip that was given to the police at least three weeks and perhaps as long as two and one half months prior to the entry of Rice's house. Moreover the tip itself was not very positive about the dynamite being at Rice's house. At the hearing on the motion to supress in the state criminal trial, Lt. (then Sgt.) Swanson testified as follows concerning the tip: 'I was told at one time that if there was dynamite in town and if the NCCF had it, that David Rice's house would be one of the places that might store it.' . . .
>
> Finally, there is no evidence in the entire record as to the reliability of the informant who gave this tip." 388 F.Supp. 201

The tip itself was weakened rather than strengthened by the additional evidence. Instead of the positive averment in the affidavit "We have been told in the past that Rice keeps explosives, at his residence . . ." the tip now becomes "David Rice's house would be one of the places they might store it."

The original affidavit for the search warrant did not indicate when the tip had been received. Swanson's testimony at the hearing on the motion to suppress shows that it was at least several weeks, and possibly several months old. After the hearing on the motion to suppress, the tip runs afoul of the rule that in order to justify a finding that property is probably upon the premises to be searched, the information "must be of facts so closely related to the time of the issue of the warrant as to justify a finding of probable cause at that time." *Sgro v. United States*, 287 U.S. 206, 210 (1932).

The other information in the hearing on the motion to suppress, which the Nebraska Supreme Court used to buttress the defective affidavit, 188 Neb. 738-739, 199 N.W.2d 487-488, merely supports the averments in the affidavit that:

> "(1) David Rice is a known member of the National Committee to Combat Fascism, which advocates the violent killing of police officers.
>
> (2) A violent killing of a police officer occurred in Omaha and arrests were made from the membership of NCCF."

However, these two averments were not rejected by either the district court or the court of appeals. Rather, both courts held that the averments were insufficient to demonstrate probable cause to believe that dynamite was on Rice's premises or to corroborate the tip. Thus, the Court of Appeals stated:

> "The averments of the affidavit that petitioner was a member of the NCCF and that the NCCF members had already been arrested in the case possibly enhanced the suspicion that the petitioner in some way was involved in the bombing plot, but these allegations do not serve to independently corroborate the tip that weapons and explosives were in petitioner's house." 513 F.2d, 288.

Similarly, the district court held:

> ". . . In Rice's case, the averment that he is a member and minister of information of the NCCF which advocates the violent killing of police, that a policeman had been killed, and that arrests had been made from the membership of the NCCF, in no way suggests that dynamite would probably be stored in the petitioner's house. Perhaps such averments made it more likely that dynamite would be found in Rice's house than the house of someone else whom an unnamed informant accused of storing dynamite and about whom nothing else was known. But they do not lend sufficient support to the tip to permit suspicion to harden into a judgment that dynamite was probably in Rice's house. Mere advocacy does not in and of itself license the police to search the premises of the advocate. Such activity, provided it does not involve incitement to specific acts, is Constitutionally protected free speech. *Yates v. United States*, 354 U.S. 298, 318-319 (1957). The violent killing of a police officer would certainly render suspect a group advocating the violent killing of police. The fact that arrests had already been made from the group would further heighten suspicion of involvement in the crime by the group. The strongest implication, however, that can be drawn from these assertions is that dynamite probably was on the premises of some member of the group at some time. They do not

imply that the dynamite was probably on Rice's premises at the time the warrant was sought. It is this latter inference that the standard of probable cause requires to be made. *Brinegar v. United States,* 338 U.S. 160 (1949). The only averment besides the tip that singles the petitioner out is the one that he is minister of information. Being minister of information does not imply that one probably stores dynamite and other illegal weapons. Perhaps if the allegation were that Rice is weapons minister or something of that sort, it would heighten the inference down to a particular place. *The key failing of the averments, then is that they fail to tie down the storage of dynamite to any particular place.* Such particularity is required before a search warrant may issue." (Emphasis supplied). 388 F.Supp. 192-193.

The additional information which the police had was a mere elaboration of the basic allegations of the affidavit with regard to Rice's membership in the group and the involvement of members of the group in the killing. 388 F.Supp. 197-198. It suffers from the same defect as the affidavit itself, that is, the failure "to tie down the storage of dynamite to any particular place." If the affidavit could be supplemented, the result in this case would not be changed. The additional information which Nebraska pressed upon its own courts, and which the federal courts refused to consider, does not demonstrate the probable cause lacking in the affidavit.

C. The Proposed Reasonableness Under the Circumstances Test, Which Would Not Require the Police to Have Probable Cause Before They Made an Entry to Search, Would Totally Eviscerate the Protection of Privacy Provided by the Fourth Amendment. In any Event, the State's Argument that the Police Search Here was Reasonable has no Basis in the Facts.

(1)

Nebraska argues that the exclusionary rule should be modified so as to judge police conduct of a search by reasonableness under the circumstances. Petitioner's brief pp. 39-41. The burden of this argument is that the presence or absence of probable cause is irrelevant to a judgment as to whether or not a search was reasonable. The argument is bottomed on the fact that the phrase "probable cause" is not present in the first clause of the Fourth Amendment which secures the people against "unreasonable searches and seizures," but is found only in the second or warrant clause. This argument misses the point of the Fourth Amendment.

Independent of its position in the warrant clause, the concept of probable cause is implicit in the concept of a reasonable search. The Fourth Amendment protects against intrusive invasions of privacy. Within a zone measured by his reasonable expectation of freedom from governmental intrusion, *Mancusi v. DeForte,* 392 U.S. 364, 368 (1968); *Katz v. United States,* 389 U.S. 347, 351-352 (1967), a person is in seclusion and may expect to be left alone. Outside such a zone of seclusion, he is in public, and the agents of the

government may see whatever is exposed to public view. *Hester v. United States,* 265 U.S. 57 (1924). The expectation of privacy is not absolute. It is defeasible where the governmental interest in invading the secluded area overbears the interest in seclusion. *Camara v. Municipal Court,* 387 U.S. 523, 534-537 (1967); *Terry v. Ohio,* 392 U.S. 11, 20-22 (1968). That is, the interest in privacy is defeated when the governmental interest in intrusion renders entrance reasonable.

If an act is to be judged reasonable, then there must be some reasons for the act. However, not just any reasons will do. The reasons advanced for the act must be sufficient to justify it. That is, there must be some rational relationship between the act performed and the reasons advanced to justify it. A search is undertaken to find something. The reasons advanced for a search must be reasons which justify the beliefs that the things sought are in the places to be searched. If those reasons are to be deemed sufficient, they must be reasons which would pursuade a reasonable man to believe that the things sought can be expected to be in the place searched. But, that is the definition of probable cause. *Carroll v. United States,* 267 U.S. 132, 162 (1925). Therefore, separate from its position in the second clause of the Fourth Amendment, the requirement of probable cause is implicit in the first clause whenever a search is involved. *Camara v. Municipal Court,* supra, 387 U.S. 535.

The justification for a search is the expectation of finding something, that is, the governmental interests to be weighed against the expectation of privacy in order to determine whether the governmental interest reasonably justifies the search. If the police have no reasonable

expectation of finding something, there is no governmental interest which justifies their entrance. The governmental interest is in the police finding what they seek, that interest only justifies their going where they can expect to find it.

It may be that we have misunderstood Nebraska's argument. Perhaps the intended argument runs something like this. Probable cause is measured by reasonable belief. In determinig whether a belief is reasonable, not only evidence in favor of holding it, but also the consequences of rejecting it must be evaluated. In an emergency situation, where consequences of an action are extremely grave, a beilef may be reasonable, even though it would not be under less stringent circumstances. In other words, the standard of probable cause is invariant, but its application is situationally rooted.

If that is Nebraska's argument, it is unexceptional. It is also totally irrelevant to the facts of this case. The police had reason to believe that Duane Peak was in Omaha. They may also have had reason to believe that there was more dynamite in the community, but the basis of this belief appears nowhere in the record. However a reasonable belief that what is sought is somewhere does not justify searching everywhere.

> "... In a criminal investigation, the police may undertake to recover specifics stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city conducted in the hope that these goods might be found. Consequently a search for these goods, even with a warrant, is 'reasonable' only where there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Camara v. Municipal Court,* supra 387 U.S. 535.

(2)

To demonstrate grounds for belief that explosives were at Rice's house, the State can point only to a stale and equivocal tip from an unknown source of unknown reliability. The police had no basis for believing that Peak was in the house. Nor were the police acting in an emergency. As the Court of Appeals noted, the argument that an emergency existed was completely refuted by the actual conduct of the police at the time of the search.

> "The conduct of the police upon arrival at petitioner's home, however, errodes the exigent circumstance argument. After receiving no response to their knock on the door, the officers decided to obtain a search warrant. After a delay of more than an hour the police finally entered the house, eventually discovering the dynamite and other items admitted at trial.

The delay of more than an hour before entering the dwelling impairs the State's contention that the police were constrained by a sense of urgency to act swiftly, without regard to the mandate of the Fourth Amendment. Nor, apparently, did the police make any attempt to protect neighboring residents in the area from any asserted danger of explosion. Moreover, testimony before Judge Urbom suggests that the purpose for searching for explosives was an afterthought conceived after the police arrived at the house, rather than an urgent emergency, and that they decided to apply for a warrant to search for explosives in petitioner's house only because they had not discovered dynamite in any of the other locations they had searched earlier in the day.

As for the apprehension that Peak was being killed, the delay of more than an hour before

> entering the house greatly attenuates the force of this argument." 513 F.2d 1294-1295.

Under the evidence in this case, Nebraska's argument for reasonableness reduces to an argument that police may search premises in a situation where neither life nor property is in danger and where there are no grounds for belief that either a seizable person or a seizable thing is on those premises. If that is the reasonableness test which the State seeks to have applied, then whatever the police do is reasonable.

The search for Peak was founded "on nothing more than a hunch or random guess." The search "for explosives was an afterthought . . . because they had not discovered dynamite in any of the other locations they had searched earlier in the day." Where no emergency exists, where life is not threatened, where property is not in danger, hunch, conjecture, and afterthought do not justify setting at naught human rights specifically protected by the Constitution. As the district court noted:

> ". . . The privacy of one's home and the concomitant ability to decide whom it shall shelter and when is one of the most precious rights we possess as citizens. Entry into the home by police absent probable cause to so enter is precisely what the Fourth Amendment forbids. Apprehension of a dangerous criminal outweighs this interest in the privacy of one's home only if there is probable cause to believe that the criminal is in the home." 388 F.Supp. 202.

II.

THE COURTS BELOW CORRECTLY HELD THAT RICE EXHAUSTED HIS STATE REMEDIES ON THE ISSUES OF POSSIBLE JUSTIFICATIONS OF THE SEARCH AT 2816 PARKER BECAUSE OF THE EXISTENCE OF EXIGENT CIRCUMSTANCES OR THE POSSESSION BY THE POLICE OF AN ARREST WARRANT FOR DUANE PEAK.

Having held that the search at 2816 Parker could not be justified by the warrant, the district court was then faced with the issue of whether or not it could pass upon the alternative justifications offered by Nebraska for the search. In the Supreme Court of Nebraska, Rice had attacked the validity of the search warrant used to justify the search. The State defended the warrant but argued alternatively that the search could be justified either by exigent circumstances or by possession of the arrest warrant for Duane Peak. Since the Supreme Court upheld the validity of the warrant, it did not pass upon the alternative justifications for the search. Nevertheless, the district court held that the exhaustion requirement of 28 U.S.C. Sec. 2254 had been satisfied on these issues. Its holding was affirmed by the court of appeals. These rulings on exhaustion are clearly correct.

This Court has placed the prerequisite of exhaustion on an alternative double aspect. Petitioner may demonstrate satisfaction of the exhaustion requirement either by showing that the question he seeks to litigate in the federal habeas proceeding had already been presented to the highest court of the state or by showing that he has no clearly available state remedy.

On either of these alternative aspects Rice has satisfied the requirement of exhaustion.

The requirement of exhaustion does not require repetitious applications in the state courts, *Humphrey v. Cady*, 405 U.S. 504, 516 N. 18 (1972); *Wilwording v. Swenson*, 404 U.S. 249, 250 (1971). The test for exhaustion is whether the state courts have been given an opportunity to pass upon the issue, not whether they have in fact passed upon it. *Picard v. Conner*, 404 U.S. 270, 275 (1971); *Sanders v. United States*, 373 U.S. 1, 16 (1963). Once there has been presentation, the requirement of the exhaustion test was met. *Humphrey v. Cady*, supra, 405 U.S. 516, fn. 18.

In this case, the alternative justifications for the search were fully briefed and argued in the Nebraska Supreme Court by both the State and Rice. Those issues were not addressed by the Supreme Court of Nebraska because they became superfluous when the court held the warrant valid. Nevertheless, there was full presentation.

Alternatively, it is clear that at the time he filed his petition for habeas corpus, Rice had no available state remedy. The exhaustion requirement is to be measured as at the time of filing of the writ. *Fay v. Noia*, 372 U.S. 391, 435 (1963); *Humphrey v. Cady*, 405 U.S. 504, 516 (1972). On the date upon which Rice filed his application for the writ, there was no way in which the alternative grounds for validating the search could have been litigated in the Nebraska courts. So long as the Nebraska courts held the warrant valid, the presence or absence of exigent circumstances or the validity or invalidity of the search insofar as it could be supported by the arrest warrant for Peak were irrelevant. Even if there were no exigent circumstances and the search

could not be justified because of the possession of the arrest warrant, in Nebraska the search was still valid.

The decision by the district court that the warrant was invalid opened up a new avenue of relief in the Nebraska state courts, if they chose to accept the district court's decision. However, since that avenue of relief did not exist at the time of filing, it was not an avenue which Rice needed to pursue. *Roberts v. Lavallee*, 389 U.S. 40, (1967); *Francisco v. Gathright*, __U.S.__, 42 L.Ed.2d 226, (1974).

III.

THE DISTRICT COURT HAD JURISDICTION UNDER 28 U.S.C. § 2254 TO ENTERTAIN RICE'S PETITION FOR HABEAS CORPUS AND TO GRANT HIM THE RELIEF WHICH HE SOUGHT.

In *Brown v. Allen*, 344 U.S. 443 (1953) and again in *Fay v. Noia*, 372 U.S. 391 (1963) this Court held that the habeas corpus jurisdiction of the district court reached any case in which the claim was made that a state conviction was infected with constitutional error, that is, any state case in which controlling federal constitutional law had been misapplied. When *Mapp v. Ohio*, supra, made the exclusionary rule applicable to the states, that holding brought state search and seizure cases within the ambit of § § 2254. Following on *Mapp*, the courts of appeals began to entertain state search and seizure cases without any qualms about jurisdiction. *Hall v. Warden*, 313 F.2d 483 (4th Cir. 1963); *U.S. ex rel Linkletter v. Walker*, 323 F.2d 11 (5th Cir. 1963), aff. 381 U.S. 618 (1965); *California v. Hurst*, 325 F.2d

891 (9th Cir. 1963); *U.S. ex rel Anglet v. Fay*, 333 F.2d 12 (2d Cir. 1964); *Sisck v. Lane*, 331 F.2d 235 (7th Cir. 1964); *Hubbard v. Tinsley*, 336 F.2d 854 (10th Cir. 1964); *Burnside v. Nebraska*, 346 F.2d 88 (8th Cir. 1965). *In Henry v. Mississippi*, 379 U.S. 443, 452 (1965) this Court intimated that the view on jurisdiction which the courts of appeals were taking was correct. It confirmed the jurisdiction in *Linkletter v. Walker*, 381 U.S. 618 (1965) by deciding that case on the merits.

Linkletter was a habeas corpus case. If a conviction obtained through the use of illegally seized evidence did not come within the habeas corpus jurisdiction, the courts appealed from would not have had jurisdiction. *Carfer v. Caldwell*, 200 U.S. 293 (1906); *Matters v. Ryan*, 249 U.S. 375 (1919). Since this Court's jurisdiction depends upon that of the courts below, it would not have had jurisdiction to reach the merits. *Mansfield, C.& L.M.R.R. v. Swan*, 111 U.S. 379,382 (1884); *Treinies v. Sunshine Mining Co.*, 308 U.S. 66, 70 (1940). Since this Court reached the merits, it necessarily determined that federal habeas corpus is available for a prisoner claiming his conviction was obtained through the use of evidence procured in violation of the Fourth Amendment. *United States v. Haley*, 371 U.S. 18 (1962); *Thornton v. United States*, 368 F.2d 822, 828-829 (majority opinion), 831 (dissenting opinion) (D.C. Cir. 1966); *Wilson v. Porter*, 361 F.2d 412, 416 (9th Cir. 1966). Since *Linkletter*, this Court has consistently taken jurisdiction over habeas corpus cases involving state prisoners claims of 4th Amendment violation. *Warden v. Hayden*, 387 U.S. 294 (1967); *Carafas v. LaValle*, 391 U.S. 234 (1968); *Mancusie v. DeForte*, 392 U.S. 364 (1968); *Schneckloth*

v. Bustamonte, 412 U.S. 218 (1973) cf. *Kaufman v. United States*, 394 U.S. 217 (1969).

Now, more than twenty years after *Brown v. Allen* and ten years after *Linkletter v. Walker*, Nebraska argues that the federal habeas corpus jurisdiction should be modified by excluding search and seizure cases from its reach. Brief of petitioner, at 45-51. We believe that adoption of the position there taken, that federal habeas corpus in search and seizure cases should be limited to situations in which the petitioner has been denied a fair opportunity to litigate the search and seizure issue in the state courts, constitutes an impermissible interference with Congressional authority over the jurisdiction of the lower courts. The remedy, if adopted, would remove from federal habeas precisely the type of cases where habeas is most necessary to vindicate Constitutional rights. The modification would substantially interfere with the operation of the exclusionary rule in the type of case in which it is most likely to perform its deterrent function. And the proposed modification is unsound, since it cuts deeper than the evil at which it is aimed. In any event, elementary considerations of fairness dictate that any change in the habeas jurisdiction in search and seizure cases be applied prospectively only.

A. Adoption of the Fair Opportunity Limitation on Federal Habeas in Search and Seizure Cases Would Constitute an Impermissible Interference With the Legislative Authority of Congress. If Such a Change in the Historic Reach of Federal Habeas is to be Made, the Change Should Emanate From Congress.

> "* * * The Fourteenth Amendment does, after all, direct supervening commands to the state in the management of their criminal law; the Constitution does not accept the state process as 'complete'. The creation of a remedial framework to assure effective implementation of these commands is, therefore, one of the important tasks of our system * * *" Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441, 445-446 (1963)

"The creation of a remedial framework to insure effective implementations of these commands" is a task assigned in the first instance to the Congress. Collings, *Habeas Corpus for Convicts—Constitutional Right of Legislative Grace?*, 40 Cal. L. Rev. 346, 356-357 (1952); Pollack, *Proposal to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ*, 66 Yale L.J. 50, 63-65 (1956); *Katzenbach v. Morgan*, 384 U.S. 641 (1966). Congress performed that function when it enacted the Habeas Corpus Act of 1867. What this Court did in *Brown v. Allen* was to recognize that "in 1867, Congress changed the common law rule" by extending the writ of habeas corpus to cases where a person is restrained in violation of the Constitution, *United States v. Hayman*, 342 U.S. 205, 211 (1952) and to take seriously the language which Congress used "violation of the Constitution."

As Collings notes:

> "Even a superficial study of federal habeas corpus will bring to light the hard facts that the power to issue the writ, like nearly every other power of the federal courts, stems from statute rather than from the Constitution. The Constitution empowers Congress to make exceptions from and regulate appellate jurisdiction of the Supreme Court, and to establish inferior courts. It naturally

> follows, in the absence of a specific guarantee of habeas corpus, that Congress has power to provide for the writ and to regulate its scope and procedure. This has been the holding of the Supreme Court practically from the beginning of the government." Collings, op. cit., 40 Cal. L. Rev. 346.

If "Congress has power to provide for the writ to regulate its scope and procedure, then once Congress had done so, the appropriate form in which to seek change in that "scope and procedure" is the Congress. Such change has regularly been sought since 1954, but has not been forthcoming. Appropriate deference to the legislative function of the Congress with regard to Article III jurisdiction mandates that the modification suggested in *Schneckloth v. Bustamonte* be addressed to Congress. *Brown v. Allen* has been the law for 22 years. It marked the culmination of a process of evolution, rather than a startling revolution in federal law. It achieves the will of the Congress in enacting the Habeas Corpus Act of 1867. If *Brown v. Allen* is to be overruled, either in whole or in part, it is the function of Congress to overrule it.

1. The original history and subsequent evolution of §§2254 fully support the jurisdiction of the district court over a state petitioner's habeas corpus action grounded upon a claim of improper denial of the suppression remedy.

Habeas corpus jurisdiction was granted to the District Court by the Judiciary Act of 1789. That act provided that:

> "* * * Judges of the District Court, shall have power to grant writs of *Habeas Corpus* for the purpose of an inquiry into the cause of commitment.–*provided*, that writs of *Habeas Corpus* shall in no case extend to prisoners in gaol unless where they are in custody, under or by color of the authority of the United States, or are committed for trial before some court of the same, or are necessary to be brought into court to testify." 1 Stat. 81

There are two notable points about this original grant. Firstly, the grant did not reach State prisoners, unless the writ of habeas corpus ad testificandum was issued. *Ex parte Dorr*, 3 How. 103 (1845); Bator, *"Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,"* 76 Harv. L. Rev. 441, 465 (1963). Secondly, the original statute did not define the grounds upon which the writ would issue. Bator, op. cit., 76 Harv. L. Rev. 465-466. Because the common law writ was named, but the grounds of its issuance were not stated, this Court used common law doctrine to define the scope of the grant. *Ex parte Bollman*, 4 Cranch 75, 93-95 (1807); *Ex parte Watkins*, 3 Pet. 193, 201-202 (1836).

Until after the Civil War, with additions not here relevant, the original Judiciary Act remained the fount of habeas corpus jurisdiction. Bator, op. cit., 76 Harv. L. Rev. 465, n., 46. The period during which the first Judiciary Act governed habeas corpus was a time of only limited federal jurisdiction.

> "During more than seventy years following the first Judiciary Act of 1789, Congress acted substantially on the principle 'that private litigants must look to the state tribunals in the first instance for vindication of federal claims, subject to limited review by the United States Supreme

Court.' It was not then supposed that the necessary and proper place for the trial litigation of all issues of federal law was in the lower federal courts, and no general federal question jurisdiction was given those courts. Original civil diversity jurisdiction was given, and civil removal jurisdiction was allowed in three classes of cases, where it was particularly thought that local prejudice would impair national concerns. But care was taken to exclude the federal trial courts from involvement in state criminal process, and section Fourteen of the Judiciary Act expressly excepted state prisoners from the federal habeas corpus power." Amsterdam, *"Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,"* 113 Univ. of Penn. L. Rev., 793, 805-806 (1965).

The Civil War brought about a total reversal of views as to the appropriate roles of state and federal courts where questions of federal law were involved. *Steffel v. Thompson,* 415 U.S. 552, 463-464 (1974); *Zwickler v. Koota,* 389 U.S. 241, 245-247 (1967).

> "From this sweep of history it appears the Civil War radically altered the view which the national legislature had previously taken that generally the state legislatures, courts, and executive officials were the sufficient protectors of the rights of the American people. The assumption was abandoned that the state courts were the normal place for the enforcement of federal law, save in rare and narrow instances where they affirmatively demonstrated themselves unfit or unfair. Now the federal courts were seen as the needed organs, the ordinary and natural agencies, for the administration of federal rights. This is apparent in the grant of federal question jurisdiction in 1875. But, it is in the realm of civil rights, prime concern of the

> reconstruction Congresses and to them the patent sempiternal battleground of state the national authority, that the reversal of attitude was complete and completely expressed in law. The thirteenth, fourteenth and fifteenth Amendments wrote in to the Constitution broad new guarantees of liberty and equality in which the federal government committed itself to protect the individual against the States. The four major civil rights acts contained jurisdictional provisions making the federal courts the front line of federal protection. Power was given those courts in civil actions to enjoin or redress every deprivation by the states of 'rights, privileges, or immunities secured by the Constitution,' using every remedial device known to federal law. Habeas corpus, 'the most celebrated writ in English law' was given the federal judges 'in all cases where any person may be restrained of his or her liberty in violation of the constitution or of any treaty or law.' 'Is it impossible to widen this jurisdiction.' No longer chary of interfering in state criminal prosecutions which had proven potent instruments of harassment, Congress enacted criminal removal statutes in 1863 and 1866 covering cases arising out of the War, in 1864 and 1866 covering cases arising out of enforcement of the wartime revenue acts, in 1866 covering cases of all persons prosecuted for acts under color of authority of civil rights laws and all persons who could not enforce their newly given civil rights in state Courts, in 1871 covering voting enforcement cases. Indeed, in 1866, it took the extraordinary step of opening the federal courts to original criminal prosecutions under state law where the prosecutions affected persons who could not enforce those rights in the state courts." Amsterdam, op. cit., 113 Univ. of Penn. L. Rev., 828-829.

As Amsterdam notes, part of the change in the pattern of Federal jurisdiction, which followed the Civil War, was the enactment of a new habeas corpus act. That act, 14 Stat. 385, Ch. 28, 1, provided that:

> "The several Courts of the United States * * * within their respective jurisdictions, in addition to the authority already conferred by law, shall have power to grant writs of habeas corpus in all cases where any person may be restrained of his or her liberty in violation of the Constitution, or any treaty or laws of the United States * * *"

That language, substantially unaltered, is now contained in 28 U.S.C. §2254.

The new habeas corpus legislation differs from the original legislation in two vital respects. Firstly, it now reached state prisoners. Secondly, the new act did not merely refer to the writ, leaving the grounds for its issnance to be inferred from the common law. It explicitly stated the grounds upon which the writ would issue, "custody in violation of the constitution or laws or treaties of the United States * * *".

The 1867 Act is marked departure from the original act. The courts are no longer left dependent upon the common law for the grounds of habeas corpus. Grounds are stated. Thus, as this Court has often recognized, whatever the scope of the common law writ may have been, the scope of federal habeas corpus is to be determined from the language Congress used in granting jurisdiction. *Johnson v. Zerbst,* 304 U.S. 458, 465-466 (1938); *Walker v. Johnston,* 312 U.S. 275, 285 (1941); *United States v. Hayman,* 342 U.S. 205, 211 (1952).

It is difficult to conceive of language broader than that used in granting jurisdiction. All custody in violation of the Constitution or laws or treaties of the United States" is reached. As this Court noted, when it

first had occasion to consider the 1867 Act, in *Ex parte McCardle,* 73 U.S. 318, 325-326 (1868),

> "This legislation is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every court and of every judge every possible case of privation of liberty contrary to the National Constitution, treaties or laws."

As the Court went on to note,

> "It is impossible to widen this jurisdiction." 73 U.S. 326.

The debate on the act was quite limited in both Houses. (The legislative history is reviewed in Amsterdam, op. cit., 113 U. of Penn. L. Rev. 819-825; and in Myers, *The Habeas Corpus Act of 1867; The Supreme Court As Legal Historian,* 33 U. of Chi. L. Rev. 31 (1965). What discussion there is, however, bears out the broad gloss this Court gave to the Act in *McCardle.* Thus, Congressman Lawrence of Ohio, in explaining the bill on behalf of the House Judiciary Committee, stated:

> "* * * This bill has been introduced, the effect of which is to enlarge the privilege of hobeas (sic) corpus and make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be confirmed upon them. It is a bill of the largest liberty, and does not interfere with persons in military custody or restrain the writ of habeas corpus at all * * * Cong. Globe, 39th Cong. 1st Sess. 41, 51 (July 25, 1866).

Similarly in the Senate, Senator Trumble of Illinois explained that:

> "I will state to the Senator of Kentucky, which he is probably aware of, that the habeas corpus act of 1789, to which the bill in an amendment,

confines the jurisdiction of the United States courts in issuing writs of habeas corpus to persons who are held under United States laws. Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case, the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States." Cong. Globe, 39th Cong. 1st Sess. 32, 29 (July 27, 1866).

As Amsterdam summarizes the legislative history:

> "Floor discussion of the Act of 1867 was thus quite limited. But its proponents told the Congress all that seemed necessary when they explained its purpose to 'give recourse to the United States courts' in cases of federally illegal detention, and to expand the habeas corpus jurisdiction to its constitutional limits. * * *" Amsterdam, op. cit., 113 Univ. of Penn. L. Rev. 823.

Myers argues that the draftsman of the 1867 Act did not contemplate its application to persons convicted by a state court. That this possible application was not specifically in the minds of those who sponsored and supported the act is not surprising, since as Myers notes:

> "Even the possibility of a state prisoner being held in violation of the constitution was remote. The Constitution in 1866 contained no provision protective of the state criminal defendant against procedural injustice, other than the prohibition against bills of attainder. No state conviction had ever been set aside by the Supreme Court on any ground other than that the statute creating the defendant's offense was an unconstitutional inva-

> sion of power's reserved to the national government or in conflict with exercise of the federal power. There was, thus, in effect no possibility of a state prisoner being held in violation of a constitutional procedural right. * * *" Myers, op. cit., 33 Univ. of Chi. L. Rev. 44-45.

Others have read the history of the act differently.

> "It is impossible to read these debates of the Thirty-Ninth Congress without concluding that the Federal legislatures were intensely aware of the hostility and antiunion prejudices of the Southern state courts, and of the use of State Court proceedings to harass those whom the Union had an obligation to protect." Amsterdam, op. cit., 113 Univ. of Penn. L. Rev. 825; Cf. *Fay v. Noia*, 372 U.S. 391, 415-417 (1963)

However, assuming that Myers' gloss on the history of the statute is the proper one, it is difficult to see its relevance. As his comments demonstrate, if Congress did not foresee application of the Habeas Corpus Act of 1867 to convicted state prisoners, that was because it could not foresee the reach which the due process clause of the Fourteenth Amendment would eventually have in state criminal cases. However, in the Act of 1867, unlike the Act of 1789, Congress did not choose to wed the habeas corpus jurisdiction to historically limited language. Rather, it made the jurisdiction coterminous with imprisonment in violation of the Constitution. Habeas corpus jurisdiction over state prisoners was made a function of the Constitution and was set free to vary with the growth of the federal constitutional rights of those charged with crime in state courts.

> "* * * The Act of 1867 provided broadly that federal courts should 'have power to grant writs of habeas corpus in all cases where any person may

be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States.' The limits of federal concern with the civil and criminal law of the States were thus staked at the boundaries of the privileges and immunities, equal protection, and due process of legislation and adjudication." Schaefer, *Federalism and State Criminal Procedure,* 70 Harv. L. Rev., 1, 20 (1956)

Turning now to Bator's article, it is difficult to see the relevance of his study. His ultimate conclusion on the Habeas Corpus Act of 1867 is that"

> "Read in the context of its time, the statute may at most be regarded as ambiguous with respect to what matters would be deemed to render a detention and lawful under Federal Law . . ." Bator, op cit, *Finality in Criminal Law,* 76 Harv. L. Rev. 477.

He attempts to cure the ambiguity by reading the Act of 1867 against the backdrop of pre-1867 habeas corpus practice. However, the adequate opportunity doctrine for which he opts, clearly departs from pre-1867 habeas corpus practice, since it looks behind the jurisdiction of the sentencing court. Bator, op cit, *Finality in Criminal Law–*, 76 Harv. L. Rev. 466. Moreover, Bator's study demonstrates that post 1867 Habeas was considerably broader in scope than the pre-1867 writ. Bator, op. cit, 76 Harv. L. Rev. 466-468. While in some instances, the cases were decided under the 1789 Act rather than the 1867 Act, this was because the court in effect read the later act into the earlier. See Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace*?, 40 Cal. L. Rev. 335, 352 (1952). Thus, it is difficult to follow Bator's argument that the 1867 Act should be read as if

it merely continues the pre-1867 habeas corpus practice, when his own study demonstrates that it was never given that reading.

In the 1867 Act, Congress gave jurisdiction over all imprisonments in violation of the Constitution. It intended the literal reach of the language it used. It intended that that reach be defined by the definition which this Court gives to the Constitution. Once, however, this Court determines that a particular constitutional right must be recognized by the States , then failure to recognize that right in a state process brings a convicted person within the ambit of of the 1867 Act. When this Court in *Mapp* made the exclusionary rule binding on the states, it brought cases such as this one within the habeas corpus jurisdiction of the district courts. Bender, *The Retroactive Effect of an Overruling Constitutional Decision, Mapp v. Ohio,* 100 U. Penn. L. Rev. 650, 656-657 (1962); Amsterdam, *Search, Seizure and Section 2255; A Comment,* 112 U. Penn. L. Rev. 378, 379-380 (1964).

Just as this case comes within the original intent of the Habeas Corpus Act, so also, it comes within the interpretation of that Act by this Court, as it is evolved from the time of the passage of the Act.

> "It was many years before the full potentials of the 1867 Act were realized. * * * The major reason was that the Court was slow to utilize the sophistical possibilities of the 'due process' clause of the 14th Amendment in determining whether a person was restrained of his liberty in violation of the constitution." Collings, *Habeas Corpus for Convicts–Constitutional Right or Legislative Grace*?, 40 Cal. L. Rev. 335, 352 (1952).

However, even before this Court began to recognize the reach of the due process clause of the 14th Amendment, it treated the habeas corpus jurisdiction as broader than the jurisdiction at common law. *Ex parte Lange*, 18 Wall. 163 (1873); *Ex parte Seibold*, 100 U.S. 371 (1879); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *Hans Nielson, Petitioner*, 131 U.S. 176 (1889).

These early cases were the beginning of "a long process of the expansion of the concept of a lack of 'jurisdiction'." Hart, *"Forward; the Time Chart of the Justices"*, 73 Harv. L. Rev. 84, 104 (1959). This sporadic process of expansion became a linear evolution from *Moore v. Dempsey*, 261, U.S. 86 (1923), to *Johnson v. Zerbst*, 304 U.S. 458 (1938), through which the Court expanded the concept of a jurisdictional defect in tandem with the expansive recognition of constitutional rights of the accused, so that the denial of such rights became a jurisdictional defect. Thereafter, in *Waley v. Johnson*, 360 U.S. 101 (1942), the Court turned directly to the language granting jurisdiction, and held that the jurisdiction "extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his right." 360 U.S. 104-105. Finally in *Brown v. Allen*, 344 U.S. 443 (1953), the Court decided that:

> "* * * Due process of law in the case of state prisoners is not primarily concerned with the adequacy of the state's corrective process, or the prisoner's personal opportunity to avail himself of this process—with the proper operation, in other words, of the rules distributing authority to make decisions—but relates essentially to the avoidance in the end of any underlying constitutional error—that is, to the correct application of basic Federal rules governing the decision to be made. * * *" *Hart*, op. cit., 73 Harv. L. Rev. 106; cf. *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038, 1045-1062 (1970), where the evolution of Habeas Corpus is also traced.

The habeas corpus jurisdiction over prisoners has expanded as the application of the Constitution to state criminal trials has expanded. The process of evolution has been an all but inevitable outcome of the original decision of Congress to let the habeas corpus jurisdiction follow the constitution. Thus in *Linkletter v. Walker*, 381 U.S. 618 (1965) and *Warden v. Hayden*, 387 U.S. 294 (1967), when this Court recognized that *Mapp* brought exclusionary rule cases within the habeas corpus jurisdiction, the Court merely continued the process of integrating the habeas jurisdiction into the ambit of constitutional rights.

2. The modern scope of federal habeas corpus, which includes within its zone state search and seizure cases, is fully consistent with the historic understanding of the writ at the time the constitution was adopted.

In *Fay v. Noia*, supra, this court read the Act of 1867 as intended "to provide a federal forum for state prisoners having constitutional defenses by extending the habeas corpus powers of the Federal Courts to their constitutional maximum." 372 U.S. 426. As we have already demonstrated, that reading is fully consistent with the legislative history of the Act of 1867. However, the court buttressed this reading by noting that "at the time the privilege of the writ was written

into the Federal Constitution it was settled that the writ lay to test any restraint contrary to fundamental law * * *" The concurring opinion by Mr. Justice Powell in *Schneckloth* concedes that if this reading is correct, "the present wide scope accorded the writ would have arguable support, despite the impressive reasons to the contrary." 412 U.S. 253. However, that opinion goes on to argue that "Fay's version of the writ's historic function" is distorted. For this conclusion, principal reliance is placed upon Oaks, *Legal History In The High Court–Habeas Corpus,* 64 Mich. L. Rev. 451 (1966). However, a close reading of Oaks' research demonstrates that it in fact supports the conclusion reached in *Fay.*

Oaks' article deals primarily with English practice in the 17th Century. His argument is that English practice could not be the forerunner of modern federal habeas, because the writ would not run in favor of one convicted by a court of common law. If the common law court had jurisdiction that was the end of inquiry on habeas corpus. However, modern federal habeas penetrates the jurisdiction of a state court to examine the constitutional adequacy of its process. Thus, Oaks' argument runs, the common law practice could not be precedent for what is done today.

Oaks notes that the scope of habeas was considerably broader where inferior courts were involved, 64 Mich. L. Rev. 456-457; 459-460. A similar divergence in practice, where inferior courts were concerned, apparently existed in some states before the Civil War. Oaks, *Habeas Corpus in the States–1776-1865* 32 U. Chi. L. Rev. 243, 259-260 (1965). Thus, the historic limitations on the writ where courts of coordinate jurisdiction were involved are only relevant on the assumption that the

federal habeas court and the state courts are courts of coordinate jurisdiction. But as Oaks, himself, has noted:

> "If the rule limiting habeas corpus review to so-called jurisdictional defects did not apply to writs issued by a court with supervisory authority over the committing court, the exception could easily engulf the rule in the important area of federal review of state commitments. On issues of federal law, federal courts have 'supervisory authority' over state courts, which they can appropriately exercise by means of their statutory authority to issue the writ of habeas corpus for state prisoners." Oaks, op. cit. *Habeas Corpus in the States,* 32 U. Chi. L. Rev. 288 fn 242.

In the struggle between this court and the Virginia Court of Appeals during the Chief Justiceship of John Marshall, the Virginia Court resisted the appellate jurisdiction of this court upon the grounds that both the Virginia Court of Appeals and this Court were courts of coordinate jurisdiction; each was the highest court within a separate but equal legal system. However, in *Martin v. Hunter's Lessee,* 1 Wheat. 304 (1816) and *Cohens v. Virginia,* 6 Wheat, 264 (1821), this court determined that the Supremacy Clause gave to it a superior position on questions of Federal Law. As Bator notes:

> "... In a unitary jurisdiction appellate review provides authoritative and uniform pronouncements on the law of that jurisdiction; similarly, recourse in our federal systems to the Federal Supreme Court provides the state law with authoritative and uniform pronouncements of federal law. (It is for this reason that I do not view direct Supreme Court review of State cases as in any sense 'collateral.') Appeal, then serves that aspect of justice which tells us that the same law

> ought to apply to different people similarly circumstanced, and, curiously, in this sense does not subvert repose, but creates it. . ." Bator, op cit, *Finality in Criminal Law,* 76 Harv. L. Rev. 453-454.

But the same comment may logically be made with regard to the habeas jurisdiction of the District Courts. As Justice Frankfurter noted in *Brown v. Allen,* supra, 344 U.S. 510:

> "Insofar as this jurisdiction enables Federal District Courts to entertain claims that the State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect respecting the supremacy clause of the Constitution whereby federal law is higher than State Law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law. The fact that Congress has authorized district courts to be the organ of the higher law rather than a Court of Appeals, or exclusively this court, does not mean that it allows a lower court to overrule a higher court. It merely expresses that the choice of Congress how the superior authority of federal law should be asserted."

Once it is recognized that the habeas corpus jurisdiction "merely expresses the choice of Congress how the superior authority of federal law should be asserted", then the analogy to the practice that obtained among courts of coordinate jurisdiction collapses. The appropriate analogy becomes the use of habeas corpus in cases where decisions of inferior courts were involved. If that is the proper analogy, then the claim of historic distortion evaporates.

Oaks' article *"Legal History in the High Court–Habeas Corpus"* is in large measure a critique of the statement in *Fay v. Noia,* 372 U.S. 391, 406 (1963), that, "at the time the privilege of the writ was written into the Federal Constitution it was settled that the writ lay to test any restraint contrary to the fundamental law, which in England stemmed ultimately from Magna Carta, but in this country was embodied in the written Constitution." And the statement that the historic function of the writ was "to provide a prompt and effecacious remedy for whatever society deems to be intolerable restraints * * * vindication of due process is precisely its historic office." 372 U.S. 401-402. The great difficulty, however, is that *Fay* and Oaks are talking at cross purposes. If the question is what particular abuses did habeas corpus reach, then as Oaks has elsewhere noted:

> "* * * At common law and under the famous Habeas Corpus Act of 1679, the use of the great writ against official restraints was simply to insure that a person was not held without formal charges and once charged he was either bailed or brought to trial within a specific time period. If a prisoner was held by a valid warrant or pursuant to the execution or judgment of a proper court, he could not obtain release by habeas corpus * * *" Oaks, op. cit, *Habeas Corpus in the States,* 32 Univ. of Chic. L. Rev. 244-245.

However, if the question is, why did habeas corpus have that particular reach, then *Fay* has the better of the debate. As Oaks demonstrates, habeas corpus was used in the 17th Century to assure that imprisonments arose only in the ordinary course of the common law. Oaks, op cit, *Legal History in the High Court,* 64 Mich. L. Rev. 459-460, 464-466. The constitutional struggle of

that period was a struggle to assure the "due process of law" promised by Magna Carta. In the context of the times, due process was regarded as equivalent to the ordinary process of the common law. Kier, *The Constitutional History of Modern Britain* (8th ed), pp. 160, 198, 214. "Intolerable restraints" were those imposed outside those processes, and all such restraints were reached by the writ.

Fay and Oaks are not at issue on what history says. They are at issue as to why we examine history. This problem arises whenever any question of extending an historically rooted legal doctrine arises. Do we examine the history of the doctrine to find out what particular kinds of cases it reached, and then limit the doctrine only to those cases? Or do we examine history to find out the why of the rule? To determine the reason why the particular type of cases were reached by the doctrine, and they apply it to all cases within the underlying rationale of the doctrine, rather than merely to the historic incidents? At least with regard to the language of the Constitution, the broader functional analysis has always been utilized. That is what has given the Constitution its capacity to endure.

In the English understanding, "process of law is an introduction to those in power not to use coercion except with legal authority." Lucas, *The Principles of Politics*, p. 84. Under such a regime, habeas corpus functions to assure that all detentions are in accordance with the ordinary processes of law, whatever they may be. Lucas, op. cit., pp. 86-88; Dicey, *The Law of The Constitution* (10th ed.) pp. 217-219. The Constitution alters our concept of due process. The ordinary course of law is made subject to certain overriding limitations on power entrenched in the Constitution. In 1867,

when Congress provided that habeas corpus would reach all restraints in violation of the Constitution, it returned habeas corpus to "its historic office", the "vindication of due process." *Fay v. Noia*, supra, 372 U.S. 401-402. However, this "historic office" was to be performed in the American context in which due process is particularized by the specific provisions of the Bill of Rights. When the Fourteenth Amendment brought state criminal process within the ambit of the Constitution, the 1867 Act brought state convictions within the ambit of habeas corpus to assure compliance with the Constitutional notion of due process.

3. The policies which underpin the extension of federal habeas corpus jurisdiction to state prisoners fully support the application of that jurisdiction to cases in which the petitioner claims that his conviction was procured because of a misapplication of fourth amendment learning.

The existence of any federal question jurisdiction in district court is evidence of a congressional doubt that appropriate resolution of the federal issue may be expected from the state court. See Mishkin, *The Federal 'Question' in the District Courts*, 53 Colum. L. Rev. 157 (1953).

> "* * * Since the inception of the government, (federal trial) courts have been employed in cases 'in which the state tribunal cannot be supposed to be impartial and unbiased,' for as Hamilton wrote in *The Federalist*, 'The most discerning cannot foresee how far the prevalency of a local spirit may be found to disqualify the local tribunals for the jurisdiction of national causes.' The federal question jurisdiction of the federal district courts

in civil cases rest largely on the assumption that federal judges 'are more likely to give full scope to any given Supreme Court decision and particularly one unpopular locally, than are their state counterparts.' * * * Particularly, in civil cases involving civil rights, 'Congress has declared the historic judgment that within this precious area, often calling for a trial by jury, there is to be no slightest risk of nullification by state process.' * * *" Amsterdam, op. cit., 113 U. of Penn. L. Rev., 802-803.

This same suspicion of the local forum, underpins the habeas corpus jurisdiction over state prisoners.

"* * * To a state trial judge, the goals of the federal Constitution in protecting individual rights from unlawful government action, may appear less important than a conviction in a given case. The federal habeas court, however, is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals. In some sense, the federal judge's primary allegiance is to the Supreme Court's interpretation of the Constitution, while on a practical level, the state judge's allegiance to the constitution may be weakened by his proximity to the State's enforcement of its criminal law. The federal forum, therefore, may be preferable for the separate proceeding which tests the constitutional basis of the conviction, not the prisoner's guilt or innocence. * * *

"The modern habeas corpus jurisdiction, then, is best understood as an institutional device for the supervision of state enforcement of federal rights, based on the dual premises of the need for separate proceedings to ensure that individual rights are protected, and the need for a federal court to decide constitutional claims to ensure that federal rights are fully vindicated. Thus, federal collateral redetermination of constitutional claims

previously reviewed by state courts is an appropriate method of guaranteeing that the proper constitutional standard was used by the state court and that the standard was properly applied to the facts." *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1060-1062.

The modern habeas corpus jurisdiction rests "on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, * * *" Hart, op. cit., 73 Harv. L. Rev. 106. Since this Court cannot in most cases grant that review, the task must necessarily be performed by a district court exercising the habeas jurisdiction. Reitz, *Federal Habeas Corpus; Post-Conviction Remedy for State Prisoners,* 108 U. Penn. L. Rev. 461, 474 (1960); Amsterdam, *Search, Seizure, and Section 2255; A Comment,* 112 U. Penn. L. Rev. 378, 380 (1964); Mishkin, *Forward; The High Court, the Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 86-87 (1965); *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1061.

"* * * Providing a federal forum creates a greater likelihood of uniform application of federal constitutional law to all state prisoners. Not only is the possibility of local disregard of federally protected interests lessened, but also, the appellate supervision of the federal district courts by the eleven federal courts of appeals provides a cohesive influence on the federal judicial system not present when fifty independent state judicial systems interpret constitutional law. The Supreme Court's review of state decisions cannot systematically induce this sort of uniformity, for the practical burden is too great. * * *" *Developments–Federal Habeas Corpus,* op. cit., 83 Harv. L. Rev. 1061.

All of the commentary noting the necessity for federal habeas because of the practical impossibility of review in this court were composed before the work load of this Court reached the proportions that have now justified the proposal for the National Court of Appeals. See, Bright, *The Changing Nature of the Federal Appeals Process in the 1970's,* 65 FRD 496, 497-498 (a brief recent review of the various proposals). Given the necessity of shifting part of this Court's work load to another court, the argument from necessity for the federal habeas jurisdiction becomes greater.

These basic premises of the federal habeas jurisdiction have been debated. Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 Harv. L. Rev. 441, 507-521 (1963). This, it is argued that the rationale for the habeas jurisdiction gives inadequate respect to the role of the state courts in the development and application of federal law, Bator, op. cit., 76 Harv. L. Rev. 510-511. But as Amsterdam has noted:

> "The argument which asserts the value of maintaining a partnership of state courts in the administration of federal rights, is, I think, the most persuasive and least easily rebutted objection to federal judicial action anticipating state process. Nevertheless, enthusiasm for the partnership as an ideal ought not to obscure recognition that it is an ideal which state judges will never more than imperfectly than elsewhere in cases where fourteenth amendment protection is invoked to insulate unpopular activity from the power of the States to restrain. Stated as an unqualified preference for state administration on federal law which takes its shape within a matrix of state law

> regulation, the argument evidently proves too much; for every Congressionally created federal trial court jurisdiction constitutes to some extent a subordination of that value to the values of federal law enforcement by nationally responsible tribunals. And, if it is true that constitutional restrictions on the state criminal process present a particularly fertile field for valuable interaction of federal and state law in the state courts, it is also true that they present a particularly strong adversity of state and federal interests, and hence a particularly strong risk that federal rights will suffer if left in state hands." Amsterdam, op. cit., *Removal and Habeas Corpus,* 113 U. of Penn. L. Rev. 836

Similarly, it has been argued that modern federal habeas gives an inadequate deference to the state's interest in finality, Bator, op. cit., 76 Harv. L. Rev. 444-453. On the other hand, the rebuttal is made that:

> "In the case of federal habeas for state prisoners, the total impact of the finality considerations as they operate uniquely upon each habeas corpus case is a part of the gross price which the federal system pays under *Brown v. Allen* to give the prisoner his federal judge. The price is high, no doubt, but the stakes are also high, for the prisoner, and the alternatives–leaving federal 'facts' together with much of federal law' to the state trier; * * *" Amsterdam, op cit., *Search. Seizure and Section 2255,* 112 U. of Penn. L. Rev. 384-385, fn. 33.

Likewise, the argument is made that the current scope of the federal habeas jurisdiction is a distortion of the history of the writ and of the Act of 1867, Bator, op. cit., 76 Harv. L. Rev. 463-499; Mayer, *The Habeas Corpus Act of 1867; The Supreme Court as the Legal Historian,* 33 U. of Chi. L. Rev. 31 (1965);

Others familiar with the history disagree. Thus, in an exhaustive study of the history of the Habeas Corpus Act of 1867, Amsterdam notes,:

> "In my view, Bator neglects the overriding purpose of the Act of February 5, 1867, * * * to give all state prisoners both a federal trial forum and access to the Supreme Court for litigation of their federal claims, whatever those claims might be." Amsterdam, op. cit., *Removal and Habeas Corpus,* 113 U. of Penn. L. Rev. 839, n. 191.

However, none of these arguments for limiting habeas corpus jurisdiction, whatever their merits, are applicable solely to suppression cases. If the arguments have validity, they have them in all federal habeas cases. If habeas should not lie where the state has granted a petitioner a fair opportunity to litigate an issue, that is because habeas is too expansive, and not because search and seizure cases are peculiarly unsuitable for habeas resolution.

All of the arguments for limiting habeas jurisdiction were pressed on Congress in 1956, when a bill to limit habeas to cases where the State had not granted the defendant an adequate opportunity to litigate the issue was under consideration. That legislation failed passage. See Pollak, *Proposals to Curtail Federal Habeas Corpus for State Prisoners; Collateral Attack on the Great Writ,* 66 Yale L.J. 50, 51, 57 (1956). Such legislation was again considered by Congress in 1958 and in 1959, but on neither occasion did the legislation become law. Reitz, op. cit., *Federal Habeas Corpus,* 108 U. of Penn. L.Rev. 523, fn. 342. By 1959, efforts to adopt the adequate opportunity limitation were abandoned. Reitz, op. cit., 108 U. of Penn. L.Rev. 523. Finally, in 1966, with full knowledge of the gloss which this Court had placed on the Habeas Act in *Brown v. Allen,* supra,

Congress enacted §§2254, which continued the jurisdictional grant of the 1867 Act. Under standard canons of construction, *Georgia v. United States,* 411 U.S. 526,533 (1973); *Blue Chip Stamps v. Manor Drug Stores,* 43 L.Wk. 4707, 4710 (1975), when Congress reenacted the jurisdictional grant of the 1867 Act, it thus approved the gloss which this Court had placed upon it.

If some limitation, such as the fair opportunity limitation, is to be adopted in habeas cases involving search and seizures, the justification for the limitation must be found in peculiarities of search and seizure cases. The only suggested rationale for such a limitation is that the suppression remedy does not go to guilt or innocence. However, this is not a peculiarity of search and seizure cases alone. Extorted confessions are inadmissable even though there is independent evidence of their trustworthiness. *Rochin v. California,* 342 U.S. 165,173 (1952). See Traynor, *The Devils of Due Process in Criminal Detection, Detention and Trial,* 33 U. of Chi. L.Rev. 657, 665-666 (1966); Schwartz, *Retroactivity, Reliability and Due Process, Reply to Professor Mishkin,* 33 U. of Chi. L.Rev. 719, 725-726 (1966). The admission of a compelled, but reliable confession can be raised on federal habeas corpus. *Rogers v. Richmond,* 365 U.S. 534, 543-545; Bender, op. cit., 110 U. of Penn. L.Rev. 656.

Moreover, this factor of irrelevance to guilt or innocence, has not generally been thought to distinguish habeas cases involving search and seizures from other habeas cases. Thus, Amsterdam argues:

"One must distinguish at the outset the problem of federal habeas corpus for state prisoners * * * there are substantial justifications for federal district court litigation or relitigation of federal contentions invoked in bar of a state criminal conviction. Volume of cases and inadequate state procedures make reliance on the Supreme Court unsatisfactory here; the Court is not properly a routine enforcement agency; in any event with perhaps greater reason than support the district court's federal question, civil rights, and specific removal jurisdictions–not to speak of diversity jurisdiction–it makes good sense to give a state criminal defendant a federal judge to try the facts underlying his federal constitutional claim. Absent an applicable removal provision, *Brown v. Allen* thus construed the federal habeas corpus jurisdiction, * * *" Amsterdam, op. cit., *Search, Seizure, and Section* 2255, 112 U. of Penn. 1.Rev. 379-380; Bender, op. cit., 110 U. of Penn. L.Rev. 655-657.

Mishkin has gone further, and argues that the very fact that suppression cases do not go to guilt or innocence makes them even more appropriate for federal habeas resolution, than cases involving those due process guarantees which seek to guarantee the reliability of the conviction process.

"The functions of habeas corpus change significantly when the relevant constitutional requirements are not those seeking to assure the reliability of the conviction process, but rather those seeking to advance other objectives, such as respect for human dignity and integrity. It is not that constitutional guarantees of this latter kind are any less important; the contrary may well be true. Indeed, it is precisely the importance of these guarantees which justifies the granting of federal habeas corpus for their violation. For if full

compliance with the requirements of these guarantees is to be exacted, adequate means for their enforcement must be provided. Such effective enforcement of federal guarantees directed as state criminal procedure can only be through the availability of federal habeas corpus. Reliance upon direct review by the Supreme Court as the exclusive enforcement would be illusory. The sheer volume of the Court's work, not to mention inadequacy of some state procedures for presenting these questions, would preclude adequate vindication of these constitutional rights. This is true enough as to cases that raise only issues of law. It is even more significant with regard to those that present questions of fact on which federal rights may depend; even where records are adequate–let alone the many criminal cases where they are not–effective enforcement of such constitutional guarantees will only be possible through use of the federal habeas corpus channel." Mishkin, op. cit., *The Supreme Court–Forward,* 79 Harv. L.Rev. 86-87.

Independent of the arguments for maintaining the habeas corpus jurisdiction over search and seizure cases, in 1966, when Congress reenacted the jurisdictional grant in §§2254, such cases clearly came within the jurisdiction with regard to state prisoners. *Mapp* had been decided in 1961. Mapp held that the admission of unlawfully seized evidence in a state trial was error of constitutional dimension, violative of the mandate of the fourth amendment "that no man is to be convicted on unconstitutional evidence." 367 U.S. 657. This mandate of the fourth amendment was to be "enforceable in the same manner and in like effect as other basic rights secured by the due process clause * * *" 367 U.S. 660. Read with *Brown v. Allen, Mapp* brought search and seizure cases within the

habeas jurisdiction, where state prisoners were involved. The courts of appeals, as we have noted, appear immediately to have drawn this implication. For example, the Eighth Circuit which had consistently held with regard to 28 U.S.C. 2255, that claims of unlawful search and seizure "are not proper matters to be presented by a motion to vacate sentence * * * but can only be properly presented by appeal from the conviction." *Warren v. United States,* 311 F.2d 673, 675 (8th Cir. 1963) entertained state prisoner habeas corpus cases involving claims of unlawful search and seizure without indication of doubt of jurisdiction, see, e.g., *Burnside v. Nebraska,* 346 F.2d 88 (8th Cir. 1965). Finally, in 1965, this Court indicated in *Henry v. Mississippi,* supra, and then held by implication in *Linkletter v. Walker* that state search and seizure cases came within the habeas jurisdiction. "The long-standing acceptance by the Courts" of this jurisdiction, "coupled with Congress' failure to reject" this "reasonable interpretation of the wording" of §§2254, "argues significantly in favor" of continuation of the habeas jurisdiction over search and seizure cases. *Blue Chip Stamps v. Manor Drug Stores,* supra, 43 Law Week 4710. Unless §§2254 is modified by the Congress, "the judiciary may not circumscribe a right which Congress had conferred because of any disagreement it might have with Congress about the wisdom of creating so expansive a liability" *Blue Chip Stamps v. Manor Drug Stores,* supra, 43 Law Week 4715.

We have already noted that modification of habeas corpus jurisdiction is a matter for the Congress. Congress is not unaware of the arguments made for modification in the concurring opinion in *Schneckloth v. Bustamonte.* Legislation which tracks the position of

that opinion was introduced as S. 567 and HR. 3329, 93rd Cong., 1st Sess. See, *Comment, Proposed Modification of Federal Habeas Corpus for State Prisoners-Reformer Revocation,* 61 Geo. L.J. 1221 (1973). With the passage of such legislation the principles of the concurring opinion in *Schneckloth* would be embodied in the law. If it is not passed, then those principles will have been rejected by the Congress. In either event, the place of decision will be the appropriate one; legislating will be done by legislators.

The authority of Congress to determine what part of the Article III jurisdiction to grant to the inferior federal court is beyond question. With particular regard to vindication of fourteenth amendment rights, Congress is granted independent legislative authority by section five of the Amendment. *Katzenbach v. Morgan,* 384 U.S. 641; 649-651, cf. (1966); *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). The factors to be weighed in determining how these powers should be exercised are not in dispute. The countervailing factors were weighed one way by this Court in *Brown v. Allen, Fay v. Noia,* and *Linkletter v. Walker*, and another way by the concurring opinion in *Schneckloth.* Still others, have weighed the factors differently and suggested other procedures as the best accommodation of the competing values. Some find the answer in a broadened federal appellate remedy in an intermediate federal appellate court, either with or without modification of habeas. Haynsworth, *Improving the Handling of Criminal Cases in the Federal Appellate System,* 59 Corn. L. Rev. 597 (1974); Haynsworth, *A New Court to Improve the Administration of Justice,* 59 A.B.A.J. 841 (1973) Hufstedler, *Comity in the Constitution,* 37 N.Y.U. L. Rev. 841, 852-853 (1972); Friendly, *Is Innocence*

Irrelevant?, Collateral Attack on Criminal Judgments, 38 U. of Chi. L. Rev. 142, 166 (1970). Others have argued that procedural reform in habeas can accomplish solution, Lay, *Modern Administrative Proposals for Federal Habeas Corpus: The Rights of Prisoners Preserved,* 21 DePaul L. Rev. 701 (1972); Weick, *Apportionment of Judicial Resources in Criminal Cases: Should Habeas Corpus be Eliminated?,* 21 DePaul L. Rev. 740 (1972). However, in *Brown v. Allen,* this Court struck the balance. If that balance is now to be modified because of a new weighing of the arguments, it is for Congress "to assess and weigh the various conflicting considerations," *Katzenbach v. Morgan,* supra, 384 U.S. 653, and strike the new balance.

B. The Removal of Search and Seizure Questions From the Scope of Federal Habeas Corpus Would Substantially Diminish the Deterrent Effect of the Exclusionary Rule.

The concurring opinion in *Schneckloth v. Bustamonte,* supra, notes that, "the case for the exclusionary rule varies with the setting in which it is imposed." 412 U.S. 271. One of the important factors to weigh in any particular setting is the deterrent effect of the rule in that context. 412 U.S. 271. We believe that a proper weighing of the deterrent effect of federal habeas corpus strongly argues that removal of search and seizure cases from federal habeas would substantially blunt the deterrent effect of the exclusionary rule.

The argument is frequently made that the exclusionary rule fails to deter. For this proposition the universal reference is Oaks, *Studying the Exclusionary*

Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1975). However, as Professor Amsterdam has noted:

> "Professor Oaks' comprehensive survey indicates to me nothing more than that the evidence so far gathered is a stand off, and that the hopes of gathering better evidence in the future are very slim. . . . The fact that a considerable amount of illegal search and seizure activity persists despite the exclusionary sanction, . . ., certainly does not demonstrate its inefficacy as a control. A lot of people go out in the rain, even though the rain prevents many others from going out. . . ." Amsterdam, *Perspectives on the 4th Amendment,* 58 Minn. L. Rev. 349, 475 fn. 593 (1974).

Moreover, the primary weakness which Professor Oaks sees in the exclusionary rule is that it does not deter in cases where prosecution is not contemplated. Oaks, op cit. 37 U. Chi. L. Rev. 720-724. Oaks does not argue that the rule does not have a deterrent impact in cases where trial is expected. Where prosecution is likely to follow, Oaks concedes probable deterrent.

> "The point of this section is not that the exclusionary rule can have no direct deterrent effect. There are probably situations where it deters. In crimes such as homicide, where prosecution is almost a certainty and where public interest and awareness are high, the conditions for deterrence are optimal and the exclusionary rule is likely to effect police behavior . . ." 37 U. Chi. L. Rev. 731-732; Cf. Skolnick, *Justice Without Trial* (2d Ed.) pp. 224-225.

The cases that come to federal court raising search and seizure issues have generally been tried in full. Cases where search and seizure issues were resolved adversely to the petitioner and a guilty plea foilowed are barred in the absence of a showing of inadequacy of

counsel, see, *McMann v. Richardson,* 397 U.S. 759 (1970); *Tollett v. Henderson,* 411 U.S. 258 (1973). Thus, the usual federal habeas case falls into the class where the exclusionary rule has its maximum deterrent effect, the class of cases where trial can be foreseen.

One justification for the federal habeas corpus jurisdiction is that "on a practical level the state judge's allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law." *Developments in the Law–Federal Habeas Corpus,* 83 Harv. L. Rev. 1038, 1061 (1970); Cf. Amsterdam, *Criminal Prosecution Effecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction to Abort State Court Trial,* 113 Univ. of Pa. L. Rev. 793, 802-803 (1965). This "proximity to the state's enforcement of its criminal law" would have its greatest impact on a judge in cases where the constitutional provision involved was irrelevant to guilt or innocence. Mishkin, *Forward: The Great Writ, and the Due Process of Time and Law,* 79 Harv. L. Rev. 56, 86-87 (1965). Search and seizure cases are a paradigm of constitutional litigation in which guilt or innocence is not involved. They are the cases in which it is most likely that federal rules will be ignored in service of the interest of law enforcement. Amsterdam, op cit, *Fourth Amendment,* 58 Minn. L. Rev. 471-472 fn. 532.

If the federal habeas corpus jurisdiction was removed, the police would foresee resolution of search and seizure issues primarily by state trial judges likely to be more sympathetic to the policeman than to the Fourth Amendment. Since the efficacy of a sanction turns in large measure on the perception of the risks of detection and adjudication of fault, Oaks, op cit.

Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 724-725; Posner, *Economic Analysis of Law,* p. 33, this anticipation of a friendly forum would enervate the deterrent effect of the rule in cases where it now has an impact. On the other hand, the threat of having conduct reviewed before a federal judge, whose "primary allegiance is to the Supreme Court's interpretation of the Constitution," serves as a substantial deterrent, even where the police can foresee being heard in the first instance by a sympathetic state judiciary. *Developments–Federal Habeas Corpus,* 83 Harv. L. Rev. 1061.

Modification of the habeas corpus jurisdiction would impact the exclusionary rule in the very cases where it can be expected to perform its deterrent function. However, the argument is made that:

> "... on collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by Federal Court harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte,* supra, 412 U.S. 269 (Concurring opinion of Mr. Justice Powell).

The exclusionary rule does not aim at special deterrence. As Oaks explains:

> "Special deterrence ... is the effect of a sanction on an individual who has already experienced it. It measures the likelihood of his repeating particular behavior once he has been singled out to

> taste its consequences. The exclusionary rule is not aimed at special deterrence since it does not impose any direct punishment on a law enforcement officer who has broken the rule . . ." Oaks, op cit, *Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 709-710.

Rather the exclusionary rule aims at general deterrence. That is, it seeks to modify conduct by reenforcing the social norm embodied in the Fourth Amendment and by threatening sanction to those who disobey it. Oaks, op cit. 37 U. Chi. L. Rev. 710-711; Posner, *Economic Analysis of Law,* p. 7. From the point of view of general deterrence, it is not clear what, if any, relevance the delay in announcing the application the sanction has. So long as the police hear about what happened, the sanction will have its effect.

There is an additional difficulty in any attempt to argue that the removal of search and seizure cases from federal habeas corpus is a minor modification of the exclusionary rule and that, therefore, such a modification would have only a minor impact on the deterrent value of the rule. As Oaks notes:

> ". . . Direct deterrence is also dependent upon how gravely law enforcement officers view the consequences of excluding evidence, and upon how they compare those consequences with the competing alternatives. In other words, the direct deterrent effect of the exclusionary rule will depend upon the individual's perception of the relative costs of conformity or non-conformity with the rule . . . because the exclusionary rule operates upon conduct that is generally quite deliberate and frequently even the result of formal or informal law enforcement policies, it is likely to involve a calculation of alternatives at some point . . ." Oaks, op cit, 37 U. Chi. L. Rev. 710-711.

A modification of the exclusionary rule, such as removal of exclusionary cases from habeas, reduces the cost of noncompliance. While the diminution in cost may appear small, there is no reason to assume *a priori* that the corresponding change in conduct will be small. The magnitude of the effect would depend on the responsiveness of police conduct to the change in the cost of noncompliance. See Posner, *Economic Analysis of Law,* 117, 224-225, and that elasticity is an unknown.

In his concurring opinion in *Schneckloth v. Bustamonte,* supra, 412 U.S. 269-270, Mr. Justice Powell noted that:

> "* * * The non-frivolous fourth amendment claims that survive for collateral attack are most likely to be in this grey, twilight area, where the law is difficult for courts to apply, let alone for the policeman on the beat to understand. This is precisely the type of case where the deterrent function of the exclusionary rule is least efficacious, and where there is the least justification for freeing a duly convicted defendant."

The remedy proposed by the concurring opinion in *Schneckloth* is to return in Fourth Amendment cases to the rule in *Frank v. Mangum,* 237 U.S. 309 (1915), and limit "the inquiry of the federal court on habeas review of a state prisoner's fourth amendment claim * * * to the question whether the defendant was provided a fair opportunity in the state court to raise and have adjudicated the Fourth Amendment claim." 412 U.S. 266.

The remedy proposed in *Schneckloth* is broader than the evil at which it is aimed. This case demonstrates that point. This case is precisely the type of case where exclusion is likely to have a deterrent effect, a case

where the police can foresee trial. Oaks, op. cit., *Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 731-732. The legal principles applied in this case are not in the grey area. The district court and the court of appeals found a want of probable cause. Presumably, every police officer knows of the requirement of probable cause, *Lankford v. Gelston*, supra. The standards of probable cause applied "are practical and not abstract." *United States v. Vantresca*, supra, 380 U.S. 108. They are the nontechnical standards of common sense and realism, that is, the standards of a reasonable layman. *United States v. Ventresca*, supra. Therefore, they are not standards requiring legal sophistication beyond the policeman's ken. The officers in this case were not "the policeman on the beat," *Schneckloth v. Bustamonte*, supra, 412 U.S. 269, rather both Pfeffer and Swanson were command detectives, who could be expected to be familiar with and influenced by the exclusionary rule. Oaks, op. cit., *Exclusionary Rule in Search and Seizure*, 37 U. of Chi. L. Rev. 711. Yet, under the fair opportunity doctrine, this case would be excluded from federal habeas in order to exclude cases in which it bears no analogy.

If the problem is with cases "in this grey, twilight area," then the appropriate focus is upon those cases, rather than all search and seizure cases. For example, grey area cases would be eliminated, if the federal habeas court could defer to the state's decision on law questions, as it now defers to its decisions on fact questions, *Townsend v. Sain*, 372 U.S. 293, 316 (1963), unless the federal habeas judge is "left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). Alternatively, if this Court

adopts the good faith standard for suppression for which Nebraska opts, grey area cases would disappear, since the confused state of the law would prevent a finding of bad faith on the part of the police officers, see *Wood v. Strickland*, supra. But whatever the remedy, if the grey area is the problem, then the solution should be tailored to that problem.

Nebraska argues, brief of petitioner, at 50, that "the present case is a classic example of the reason why search and seizure questions should not properly be cognizable in federal habeas corpus." For this proposition, a most eccentric argument is made. Firstly, the state argues with regard to Rice's brief in the Nebraska Supreme Court that "nowhere in said brief is there any hint that Rice was innocent or that any interest of society were to be served by reversing the conviction or excluding evidence." The Nebraska Supreme Court is an appellate court. Its function is not to determine guilt or innocence. If there is a sufficient case for jury, the fact that the jury convicts someone the Nebraska Supreme Court thinks is innocent is irrelevant. See, *State v. Nydegger*, 186 Neb. 61, 187 N.W.2d 892, 896 (1970). Thus, since the appeal was not bottomed on sufficiency of the evidence, the issue of innocence was irrelevant. The Nebraska Supreme Court was bound by the decisions of this Court in search and seizure cases. Those cases did not require that a claim of innocence be made or that a showing be made that "interests of society were to be served by reversing." *Simmons v. United States*, 390 U.S. 377, 389-394 (1968). Since such claims were not required, they would have been pointless. The same point may be made with regard to the absence of these claims in the petition for habeas corpus. See, *Kaufman v. United States*, 394 U.S. 217,

242 (1969) (Mr. Justice Harland, dissenting); *Schneckloth v. Bustamonte*, 412 U.S. 218, 257-258 (1973) (Mr. Justice Powell, concurring).

David Rice has always maintained his innocence. He is not a lawyer. He did not draft the brief to the Nebraska Supreme Court. He did not draft the petition for a writ of habeas corpus. Those documents were prepared by lawyers on his behalf. Claims of innocence and claims of societal advantage were not made because they were not required by existing case laws. If the absence of those claims is now to be treated as significant, then litigation becomes less than a game. If a client suffers because his attorney takes the decisions of this Court seriously, then the law was ceased to be a profession for honorable men.[4]

---

[4]On his appeal to the Nebraska Supreme Court, David Rice was not satisfied with the brief filed by his counsel because it did not address the issue of guilt or innocence. Therefore, Rice, in conjunction with his co-defendant, Poindexter, filed a supplemental brief which attacked the finding of guilt. He raised the insufficiency of the evidence against him and attacked the admissibility of Duane Peak's testimony because of contradictions therein. In addition, he contended that Peak's testimony at trial was perjured and had come as a result of threats from the police, a deal with the office of the county attorney, and overreaching by one of the deputy county attorneys. The Supreme Court briefly addressed the issues raised in this supplemental brief.

When the petition for federal habeas was filed, Rice again filed a supplemental petition raising the issues contained in the supplemental Nebraska Supreme Court brief. The district court refused to consider this petition because it had not been filed by counsel of record.

At every stage of the appellate and post-conviction process David Rice has chafed at the advice of counsel that guilt or

If colorable claim of innocence be required, then we make it on Mr. Rice's behalf now. We note that the evidence which the state claims was found in Rice's home did not prove him guilty of the crime of which he was convicted, first degree murder. The only evidence which directly connected Rice with the murder came from Duane Peak. Since Peak confessed the murder, his testimony under Nebraska law was suspect and subject to the closest scrutiny. *Callies v. State*, 157 Neb. 640, 61 N.W.2d 370, 377 (1953); cf. *Losieau v. Sigler*, 421 F.2d 825 (8th Cir. 1966). His testimony was given under circumstances smacking of a deal. Subsequent to Rice's trial Peak was handled as a juvenile delinquent rather than an adult felon, not the usual Nebraska practice in first degree murder cases. *Fugate v. Ronin*, 167 Neb. 70, 91 N.W.2d 240 (1958); *State v. Grayer*, 191 Neb. 523, 215 N.W.2d 859 (1970). The evidence allegedly found in Rice's home was used to corroborate Peak's testimony. It takes no deep

---

innocence was not the central issue. He had done everything which he personally could, to secure federal court review of the sufficiency of the evidence. Throughout the case, he has sought a judicial finding that only Peak was involved in the killing, and that his own prosecution was politically motivated and designed to remove him from the community because of hostility to his political views. He has sought to point out that the principal witness against him, Duane Peak, was frightened of the death penalty, and that that fear was manipulated in order to secure his testimony against Rice. He has sought a judicial reexamination of the weaknesses in the testimony used to corroborate Peak; e.g., the fact that the particles in his clothing could have been other than the remains of ammonia dynamite, the fact that the copper wire was not found at the scene of the bombing, and the weakness in the testimony that his pliers had cut the copper wire. It is difficult to see what more he could have done to make a claim of innocence.

insight into human psychology to recognize that the dynamite and the dynamite particles made a contribution to the credibility of Peak out of all proportion to their probative value. They were precisely the type of evidence more likely to inflame than to enlighten a jury.

If an assertion of societal advantage from suppression is required, then we make it on Mr. Rice's behalf now. We note that Rice's house was searched pursuant to a warrant issued because 1) he belonged to a political organization whose views were obnoxious to the police, 2) other members of that organization had been arrested for a crime, and 3) at a time unknown, a person unknown had supposedly said "that Rice keeps explosives at his residence, and also illegal weapons, which he had said should be used against police officers." App. 9. If a decision in Rice's favor can deter the police, however slightly, from searching a person's home when the only evidence they have is evidence of 1) his political views, 2) wrongdoing by his political associates, and 3) information from nameless, faceless informers of unknown reliability, then society's interests are served.

> "No matter how heinous the crime, the fact of its commission alone is insufficient under our system of jurisprudence to establish the guilt of the accused. The safeguarding of fundamental constitutional rights is a tolerable price to pay for cherished standards of justice." *Rice v. Wolff*, supra, 513 F.2d 1295-1296.

With the omission of one word, Nebraska's summary of this case is accurate. "The present case is a classic example of the reason why search and seizure questions should * * * properly be cognizable in federal habeas corpus." As state trial judge and a state supreme court

upheld an affidavit for a search warrant so wanting in probable cause as to raise the suspicion that the decision upholding it was "a mask", *Moore v. Dempsey*, 261 U.S. 86, 91 (1923).[5] The principle cause shown was activity protected by the First Amendment, *Yates v. United States*, 354 U.S. 298, 318-319 (1957), so that the search trenched on the First Amendment as well as the Fourth, see *Marcus v. Search Warrant*, 367 U.S. 717 (1961); *Quantity of Copies of Books v. Kansas*, 378 U.S. 205 (1964); *Stanford v. Texas*, 379 U.S. 478

[5]In this case, 188 Neb. 739, 199 N.W.2d 488, the Nebraska Court held that an affidavit for a search warrant could be supplemented in a subsequent suppression proceeding. It repeated that holding in *State v. Dussault*, 193 Neb. 122, 225 N.W.2d 558 (1975). That holding was in direct conflict with *Spinelli v. United States*, 393 U.S. 410 (1969) and *Aguilar v. Texas*, 378 U.S. 108 (1964). Moreover, the Nebraska Supreme Court has been less than disposed to find a want of probable cause in the issuance of a search warrant. See *State v. McCreary*, 139 N.W.2d 362, 179 Neb. 589, cert. denied; *McCreary v. Nebraska*, 86 S.Ct. 1877, 384 U.S. 979, 16 L.Ed. 2d 689 (1966) of *McCreary v. Sigler*, 406 F.2d 1264 (8 Cir. 1969); *State v. Howard*, 167 N.W.2d 80, 184 Neb. 274 (1969); *State v. LeDent*, 185 Neb. 380, 176 N.W.2d 21 (1970), cf. *LeDent v. Wolff*, 460 F.2d 1001 (8th Cir. 1972); *State v. Waits*, 185 Neb. 780, 178 N.W.2d 774 (1970; *State v. Huggins*, 186 Neb. 704, 185 N.W.2d 849 (1971); *State v. Howard*, 197 N.W.2d 641, 188 Neb. 494 (1972); *State v. Bazis*, 190 Neb. 586, 210 N.W.2d 919 (1973); *State v. Torrence*, 192 Neb. 213 (1974); *State v. Glauser*, 193 Neb. 190, 226 N.W.2d 328 (1975). In only a few cases has the Nebraska Supreme Court determined a search warrant to be wanting in establishing probable cause. See *State v. Halloway* 187 Neb. 1, 187 N.W.2d 85 (1971), and *Halloway v. Wolff*, 482 F.2d 110 (8th Cir. 1973); and *State v. Kallos*, 193 Neb. 113, 225 N.W.2d 553 (1975). In *Kallos*, there was a lapse of nine (9) months between the facts alleged to establish probable cause and the issuance of the search warrant.

(1965). These factors demonstrate that there is still a role to be played by the habeas judge whose primary allegiance is to this Court's interpretation of the Constitution, an allegience not weakened by proximity to the enforcement of the criminal law.

C. Any Change in the Scope of Federal Habeas Should be Applied Prospectively Only.

Rice went to the District Court and its jurisdiction under §§2254, rather than to this Court, because in *Fay v. Noia* this Court had indicated that a petition for certiorari was no longer a prerequisite to habeas. 372 U.S. 435-438. The opinions of the District Court and of the court of appeals demonstrate that the decision of the Nebraska Supreme Court was seriously inconsistent with this Court's interpretation of the fourth amendment. Thus, Rice's case was one where certiorari might successfully have been sought. The opportunity to seek direct review here is now gone. If the jurisdiction of the District Court is now to be modified to exclude search and seizure cases, such modification should not be applied in a case such as this. It would be extremely unfair to lead a petitioner to the habeas court upon the grounds that he could obtain there what he could obtain on direct review, only later to tell him that direct review was his only remedy.

CONCLUSION

Nebraska brought this case here to request modification of the exclusionary rule. Its argument is a simple

one: The exclusionary rule frees the guilty; therefore, the exclusionary rule is bad. There is an equally simple answer to this argument: The exclusionary rule protects against unlawful acts by the police, therefore, the exclusionary rule is good. However, simplistic arguments do not solve complex legal problems. The exclusionary rule does bad and it does good. If the good could be retained and the evil eliminated, none would object to the removal of the evil. The unfortunate fact is that there now exists no remedy for violation of Fourth Amendment rights which provides an effective alternative to suppression. While the Fourth Amendment remains in the Bill of Rights, the harm which the exclusionary rule does is the price society pays for the freedom the Fourth Amendment protects.

If history teaches any lesson, it teaches that liberty under law is not a free good. A society that commits itself to the rule of law and freedom of the individual can never expect to have a populace as docile or a social life as peaceful as that prevailing in a state which abandons law and liberty to the total pursuit of order and obedience. While the exclusionary rule imposes costs on society, those costs are part of the price paid for a society in which law binds the government as well as the governed.

Human ingenuity may eventually create an instrument for assuring police compliance with the Fourth Amendment at a lesser cost than imposed by the exclusionary rule. Until such a remedy is developed and proves itself more efficacious than the exclusionary rule, the exclusionary rule must be maintained asn the vindicator of Fourth Amendment rights. Each of Nebraska's proposed modifications of the exclusionary rule substantially impairs the rules ability to defend the

Fourth Amendment. Each proposed modification should be rejected for that reason.

This case was properly brought in federal habeas corpus under 25 U.S.C. §§2254. The construction of §§2254, which brought this case within the scope of federal habeas, is of long standing. That construction is based upon a reasonable interpretation of the history of §§ 2254. That construction is based upon a rational gloss of this Court's case law under §§ 2254. Despite repeated efforts, the Congress has failed to overturn that construction of §§2254. A proper sense of the limits of the judicial function require that modification of §§2254 come from the Congress and not the courts.

The District Court acted within the scope of its jurisdiction. It accurately applied the exclusionary rule and ordered David Rice released or retried. The Court of Appeals for the Eighth Circuit affirmed. Neither the jurisdiction of the District Court nor the exclusionary rule should be modified in this case. Therefore, the decision of the United States Court of Appeals for the Eighth Circuit should be affirmed.

Respectfully submitted,

WILLIAM C. CUNNINGHAM, S.J.
801 Ladera Lane
Santa Barbara, California 93108

J. PATRICK GREEN
707 City National Bank Building
Omaha, Nebraska 68102

Attorneys for Respondent

RECEIVED
JAN 12 1976
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

No. 74-1222

CHARLES L. WOLFF, JR., Warden
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

William C. Cunningham, S.J.
801 Ladera Lane
Santa Barbara, California 93013

J. Patrick Green
707 City National Bank Building
Omaha, Nebraska 68102
Telephone: (402) 341-4018

On behalf of David L. Rice, who prepared documents pro se.

The purpose of this appendix is to show the Court that, not only was David Rice victimized by illegal search and seizure, but that the evidence used against him was insufficient to support a finding of guilt. Further, this appendix intends to show that evidence was contrived and manufactured by the office of the County(Douglas) Attorney, that certain testimony was either false or unsupported by actual evidence, and that certain Court and police officials did willfully obstruct justice in order that the State of Nebraska might obtain a conviction of David Rice.

It is realized that the main issues that appear to concern the Court in this instant case are those of the exclusionary rule and the access of State prisoners to the federal courts. However, it is of the utmost of importance that the Court be made aware of the fact that this case does not involve a matter, as the State contends, of a guilty party "beating the conviction on a technicality," but involves an innocent party being falsely accused and convicted of a crime in retaliation for his espousal of unpopular political beliefs(which included consistent verbal and written criticism of the Omaha Police Dept. and police depts. in general), which retaliation, in this instant case, amounts to a basic and fundamental right, freedom of speech, being violated by the State of Nebraska and agents thereof.

A

Exhibit 44 refers to a small length of wire introduced in evidence against Rice. It was testified by State Witness Wilder, a tool & die "expert," that this length of wire had been cut by a pair of needle-nosed pliers found in the Rice home. This pair of pliers were introduced in evidence as exhibit 35. However, the conclusion of the witness that the length of wire had been cut by the afore-mentioned pliers was unsupported. In fact, testimony by that witness, and others as well, made it clear that there was no connection between Exhibit 44 and the bombing whatsoever.

Testimony by Jerry Volcek of the Omaha Police Dept. showed that Exhibit 44 had been found, not at the scene of the bombing, but at the house next door, that it had been found on the basement floor in close proximity to a tool bench(See Vol. 7 of the trial transcript, pp. 743-745, line 16 of p. 743 through line 24 of page 745.).

The testimony of Witness Kenneth Snow indicates the following:

2B

that the piece of wire(Exhibit 44) found next to the scene of the bombing contained no remarkable characteristics that would distinguish it from any other type of copper wire(See pp. 830-831, lines 24-1.);

that there was no indication of the presence of dynamite on that piece of wire(See p. 830, lines 7-10.).

An examination of Witness Roland Wilder makes clear that:

his conclusion that Exhibit 35 had been used to cut Exhibit 44(See p. 859, lines 12-15) was little more than a very convenient opinion for the use of the State of Nebraska in its prosecution of respondent, as further testimony by the witness points out that Exhibit 44 may have been cut by pliers other than those of respondent(See p. 866, lines 19-25; p. 867, lines 1-7; pp. 867-868, lines 21-4).

At this point, respondent refers the Court to the testimony of Duane Peak and to a demonstration he gave, during that testimony, as to the manner in which the suitcase bomb was constructed. Along with the other evidence brought to the Court's attention by respondent, this testimony shows that the State willfully introduced Exhibit 44 into evidence with the full knowledge that it had no connection at all to the crime with which respondent was charged. Duane Peak testified that the copper wire used in the construction of the bomb was the lead wire attached to blasting caps(See p. 489, lines 10-12.). There was nothing in either his testimony or demonstration to indicate that any other copper wire was used in the construction of the bomb other than the blasting cap lead-wire of which type was entered into evidence as having been seized from the Rice home and designated "Exhibit

Respondent brings to the Court's attention that the wire introduced as Exhibit 20 was approximately(from eye view) one-half the diameter of the length of wire introduced as Exhibit 44; that the former appeared to be old and corroded; and that respondent and trial counsel cut from exhibit 20 a segment of wire of about the same length as that referred to as "Exhibit 44," placed the two segments in separate plastic vials, and presented these items to the jury for examination and comparison.

Respondent contends that the entering into evidence of the segment of wire found next door to the scene of the bombing, in close proximity to a work bench(where a piece of wire might naturally be found), was without justification; that the fac t that no traces of dynamite were found on the wire further supports this contention, in that the likelihood of a piece of wire used in the construction of a bomb(of such explosive force as the one which killed Patrolman Minard) not showing any evidence of such an explosion is indeed slim; that the manner in which the comparison tests by Wilder were performed are suspicious; and that the test results, showing fifteen similarities and twenty-five dissimilarities weakens further the credibility of Wilder's conclusion that the segment of wire had been cut by the needle-nosed found in Rice's home. Further, the fact that the trial judge, Donald Hamilton, permitted Exhibits 35 and 44 and the testimony in their regard to go to the jury as evidence indicates an abuse of judicial discretion and a willingness on his part to cooperate with the State's obstruction of justice in the Rice case.

B

Exhibit 33 was entered into evidence against respondent in the trial. This was a pair of pants taken from the Douglas County Jail by a Richard Curd and testified to as having been the property of David Rice. Under direct examination, Kenneth Snow stated that laboratory tests to which these pants were subjected showed the presence of certain particles, which he concluded to be particles of ammonia dynamite(See p. 795, lines 15-23.). However, under cross-examination, Snow was asked whether the particles found in Exhibit 33 could have come from some source other than dynamite. The answer he gave was to the effect that they could have(See p. 838, lines 11-22.).

Respondent takes it for granted that the Court is aware of the fact that many of the elements contained in such a common type of explosive as ammonia dynamite can also be found in such ordinary items as: matches, phosphorus detergents, gun powder, etc. Respondent contends that the testimony of Kenneth Snow shows but two things conclusively, that particles were indeed found in the right front pockets of the pants belonging to David Rice and that these particles did contain elements that can also be found in ammonia dynamite. Respondent further contends that an examination of the pants pockets of the County attorney might also have turned up particles containing elements also found in ammonia dynamite.

David Rice has maintained that he did not keep explosives in his residence (p. 1094, lines 19-23; p. 1096, lines 21-25). He contends now, as he has in the past, that the dynamite and blasting caps, in order for those items to have been found in his house, would have to have been planted there. Respondent submits to the Court the following items of evidence to lend credence to that contention.

On the evening of the police raid on Rice's home, Michael Rice(brother of respondent) and Ethan Woods were arrested outside the residence, taken to police headquarters, and questioned separately. These two parties gave statements to the police to the effect that they had gone by David Rice's house, observed a door open and lights on, that they hollared for respondent and had gotten no response, and waited out in the yard for someone to come out. They stated that they knew the residence had been burglarized some weeks before. Woods and Michael Rice were then arrested while standing in the yard(p. 734, line 13-p. 736, line 23).

BEST COPY AVAILABLE

The statements of Michael Rice and Ethan Woods, as referred to in the above paragraph are belabored by the testimony of Sgt. Swanson who testified that, after he and other officers arrived at the Rice home, he and Sgt. Pfeffer left the house to go obtain a search warrant, that the other officers remained at the house to secure it(p. 100, lines 8-15).

In support of the contention that the dynamite and blasting caps allegedly "found" in the Rice home were either planted there or were not there at all, respondent submits certain conflict in the testimony of police in regards the specific locations in the Rice home where these items were "found."

a. Sgt. Swanson testified that the box of dynamite "found" in the basement of Rice's house was not covered but was in plain view, once he had looked in the coal bin(p. 712, lines 12-16). However, Sgt. Pfeffer testified that he had prepared a supplementary report on the raid of the Rice home. In that report, it was stated that the box of dynamite was hidden under ~~the~~ a door(p. 734, lines 3-6). Further, the testimony of ~~Swanson~~ Pfeffer placed the blasting caps "found" in the Rice house inside a roll of linoleum resting next to a radio (p. 730, lines 7-8). However, in his supplementary report, it is stated that the blasting caps were found behind the radio(p. 734, lines 6-8).

b. On June 11, 1970, Federal District Court Judge Warren K. Urbom held an evidenciary hearing on respondent's petition for Writ of Habeas Corpus. During the course of that hearing, several police witnesses gave testimony as to where in the basement of 2816 Parker the box of dynamite had been "found." These witnesses were shown a photograph of the interior of the Rice basement and were asked to point out in this photo, designating the exact spot where the dynamite had allegedly been discovered. The various witnesses showed a degree of confusion in making this designation. Testimony at respondent's preliminary hearing, trial, and at the evidentiary hearing at issue placed the discovery of the box of dynamite in a coal bin in the Rice basement. The difficulty the police witnesses had in pointing out in the photo where they had "found" the dynamite was founded in the fact that the coal bin, by whatever cause, was not pictured in this photo. So that in pointing to various points on this photo and designating the location of the alleged dynamite find, these witnesses were, in fact, committing perjury.

56

BEST COPY AVAILABLE

Respondent claims and has claimed that he did not have explosives in his house. But considering the fact that police witnesses claim that they did find dynamite and blasting caps in the Rice home, the question is naturally asked, "How did such items get there?" Respondent does not pretend to know the answer to that question, but can only suggest, can only conjecture that these items were placed in his home by some party or parties other than himself.

Of course, it is not the practice of the Court to base its decisions on conjecture or mere suggestion. However, respondent submits to the Court that his contention that the dynamite and blasting caps were either not actually seized from his home or that they were planted there is supported by the afore-mentioned circumstances, circumstances that are not conclusive, but, nonetheless, throw a light of suspicion upon the police claim. Respondent is not asking the Court to base whatever decision it makes on the basis of the degree of verity of opposing claims in this matter. Rather, his purpose is to show the Court that the alleged seizure of dynamite and blasting caps was simply one of many illegal and Constitutionally impermissable procedures utilized by the State of Nebraska in order to obtain a conviction of respondent.

D

Though respondent maintains that the testimony of the State's "star witness," Duane Peak, was not credible, he nonetheless takes this opportunity to refer the Court to one element of Peak's testimony, that having to do with his implication of certain persons as having had involvement in the killing of Patrolman Minard. The Court is so referred not without intention and purpose. Respondent intends, by this presentation, to give even further evidence of foul-play on the part of the State of Nebraska in its prosecution of David Rice.

As is readily apparent to the Court, Duane Peak pointed the finger of guilt to David Rice and Ed Poindexter. But the pointing did not end with these two men, but proceeded further to the persons of Frank Peak(p. 419-421, from line 5 of p. 419 to line 8 of p. 421), Raleigh House(p. 421, line 9 to p. 423, line 11), and Donald Peak(p. 468, lines 24-25; p. 469, lines 1-6 and 13-19; p. 470, lines 1-4; p. 481, lines 13-19; p. 540, lines 16-25; p. 541, lines 3-11; p. 558, lines 14-15). And, of course, Duane Peak, by admission, pointed the finger of guilt to himself.

BEST COPY AVAILABLE

Of the six people Duane Peak implicated(himself included), the record indicates that only two, David Rice and Edward Poindexter, were prosecuted for the slaying of Minard. Duane Peak pled guilty to "juvenile delinquency." Considering the manner in which respondent was tried and convicted, it is conceivable that the State of Nebraska could have obtained convictions had it prosecuted any of the other persons implicated by Duane Peak. And, in the case of Donald Peak, the State might have had a case of considerable strength since several witnesses testified as to having observed Duane and Donald Peak together with the suitcase in question, as to having overheard these two discussing and/or laughing about the bombing(depositions of: Raymond Britt/p. 10, lines 6-11; Willie Haynie/p. 17, lines 2-25 and p. 23, lines 1-18; Annie Lee Morris/p. 8, line 23-p.11, line 13 and p. 32, lines 3-23).

It is the contention of respondent that the Douglas County Attorney's Office of the State of Nebraska were well aware, by statements of various material witnesses, of whom the guilty parties were, but was not impressed with the "political credentials" of the only two parties against whom disinterested parties might testify. Instead, the County Attorney seized upon the opportunity(presented by Duane Peak's association with N.C.C.F.) to go after the "kingpins" of the N.C.C.F. organization. The respondent, being the second

officer in that organization, fell very neatly into that category. Respondent further contends that the selective prosecution which characterized this case was no accident, that it was part of an overall design on the part of the State of Nebraska, not to see to it that the guilty were brought to justice, but to see to it that certain political agitators (respondent included) were convicted.

Respondent is not suggesting to the Court that the State of Nebraska should or should not have prosecuted certain individuals; nor does he suggest who may or may not have been involved in the Minard killing. Rather, respondent merely points out to the Court that the testimony of material witnesses is not consistent with the actions taken by the State of Nebraska in pursuing its conviction of David Rice.

BEST COPY AVAILABLE

Respondent submits to the Court that the most damaging testimony against him, that of Duane Peak, was perjured testimony, that it was the testimony of a frightened youth, fearful for his life, and pressured into implicating Rice both by threats of the electric chair and an offer by the State which would enable him to escape that chair. Respondent submits further that the alleged facts and circumstances stated in Peak's trial testimony had been bent and forged into the form of a script so as to point to the guilt of respondent, that this "blacksmith work" was encouraged and assisted by the County Attorney's Office, particularly Arthur O'Leary. Respondent submits to the Court the following, for the Court's own evaluation, in support of the above claims.

1. Perjured testimony by Duane Peak

   a. On August 28, Duane Peak gave a statement to Sgt. Foxall in which he admitted his own guilt and did not implicate Respondent Rice(p. 565, line 14-p.575, line 13). Following the conclusion of that statement, Peak appeared before Judge Anderson(p. 575, lines 14-17).

   b. On August 31, Duane Peak gave a statement to Arthur O'Leary(Deputy Chief Prosecutor). That was the first statement given by Peak implicating respondent. In that statement, Peak claimed that he and Poindexter had gone to the Rice home and that Poindexter retrieved a suitcase and a case of dynamite from the basement of the Rice residence(p. 581, lines 11-20).

c. On September5, Duane Peak gave a statement to officers Birchard, Dailey, and Pheffer in which he maintained, ~~as in the August 31 statement~~, contrary to his statement of August 31, that he had carried the suitcase into the Rice home(p. 590, lines 15-19).

d. At the preliminary hearing of respondent on September 28, Duane Peak was asked a series of questions which had to do with the alleged involvement of respondent and another party in the bomb-slaying of Minard. Peak's responses absolved respondent of involvement(See preliminary hearing transcript, p. 4, lines 4-22).

e. At that same preliminary hearing, following a recess, Duane Peak was again called to the witness stand. And, during this second testimony, Duane Peak, noticably frightened and nervous(pre. hearing transcript, p. 77, line 25-p. 78, lines 1-4), Peak implicated respondent.

BEST COPY AVAILABLE

f. David Herzog, Counsel for respondent, took a deposition of Duane Peak on February 4, 1971. In that deposition, Peak maintains that respondent was involved but claims that "David opened the door and took it(the suitcase)in."--(dep., p. 72, lines 2-5)

g. During the trial of respondent, Peak continues to point to guilt on the part of respondent. But in this testimony, he states, "I gave it(the suitcase) to Ed(p. 424, lines 1-2)."

It is not the contention of respondent that each and every statement of Duane Peak afore-cited is false. Rather, it is the contention that, if a person makes two or more statements that contradict each other, all of those statements cannot be the truth. Respondent has cited but a tiny few of the contradictory statements made by Duane Peak. There are many. But these few should be sufficient to make the Court aware of the fact that respondent's conviction was substantially the result of perjured testimony on the part of the chief and only alleged eye-witness against him. Respondent submits to the Court that, without the testimony of Duane Peak, the State could not have obtained a conviction of respondent. Should this Court accept the validity of this contention, then it must also accept that respondent was convicted by the use of perjury. It is submitted that the use of perjured testimony against a defendant denies that defendant the fundamental right of a fair trial.

2. Subornation of perjury by Arthur O'Leary

10h

- Direct Examination on Aug. 31, 1970 of Duane Peak by Special Prosecutor Art O'Leary at the Omaha Police Station.

Q. I want to go over it once again. As a practical matter, it doesn't make any difference what the truth is concerning you at all.

Mr. CAREY: Mr. O'Leary is correct on that. You want to tell him the truth.

Q. It doesn't hurt you one bit to tell me the rest, if there is any more.

A. That is all there was.

Q. What I am getting at is, when you left the bomb or the dynamite there, all there was was the wire trailing out of it and you set it upright, is that correct?

A. Yes.

Q. You didn't arm it or attach it to the floor or anything like that?

A. I didn't do anything to it.

Q. You realize now that it doesn't make any difference whether you did or didn't. That doesn't really make one bit of difference at all at this stage of the game but I want to make sure concerning somebody else that might have been involved. Because you see what it amounts to, Duane, is that eventually you are going to have to testify about everything you said here and it isn't going to make one bit of difference whether or not you leave out one fact or not, as far as you are concerned.

Do you understand what I am trying to tell you?

A. Yes.

a. As the Court well knows, to suborn perjury is to encourage another to lie under oath.

b. The suborning of perjury is effected when the person so encouraged to lie under oath does, in fact, lie under oath.

Respondent brings the Court's attention to the above-cited exchange between

BEST COPY AVAILABLE

11a

O'Leary and Duane Peak in order that the Court might examine for itself what respondent contends is, at the very least, questionable conduct on the part of the deputy chief County Attorney. Respondent contends that Duane Peak was encouraged to falsely implicate David Rice and that it did "make one bit of difference whether you leave out one fact or not," that fact being that David Rice did not have responsibility in the bomb-slaying of Patrolman Minard.

3. Coerced testimony of Duane Peak

a. Following his arrest, Duane Peak was frightened, felt alone, and wanted to call his parents, but was not permitted to do so(prelim. hearing, p. 72, lines 13-24).

b. Duane Peak was intimidated with talk by police officers of the electric chair(prelim. hearing, p. 75, lines 13-25).

c. Between the first and second time Peak testified during the preliminary hearing, he was pressured into changing his testimony(p. 78, lines 1-23) prelim. hearing).

At the time of the preliminary hearing, Duane Peak was but sixteen years of age. That he was unstable is indicated by the fact that he had been expelled from high school(prelim. hearing, p. 79, lines 5-8), had dropped out of junior high(prelim. hearing, p. 79, lines 9-14), had taken drugs (prelim. hearing, p. 83, lines 6-11). Respondent contends that Duane Peak's instability was capitalized on by an over-zealous Office of the Prosecution, which already had this youth in a corner of sorts by virtue of the fact that there were too many people prepared to give testimony as to Peak's culpability. From Peak's perspective, he had no choice but to cooperate with the machinations of the State in its prosecution of respondent.

4. Bargain for 'juvenile delinquency'

a. Thomas Carey was the legal counsel for Duane Peak.

b. As counsel for Peak, he was instrumental in obtaining a deal whereby Peak would be permitted to plead guilty to lesser charges than first-degree murder(p. 1035, line 2-p. 1036, line 13).

c. In fact, shortly after Rice had been convicted of murder in the first-degree, Duane Peak did have his day in court and pleaded guilty to 'juvenile delinquency.'

Respondent submits to the Court that Duane Peak's testimony was a direct result of the combined factors of threats by police officers and possibly others connected with the official State apparatus, encouragement to give false testimony by Arthur O'Leary, and the offer of a deal "letting him off the hook" in exchange for his testimony implicating Rice.

BEST COPY AVAILABLE

E

It is submitted to the Court that the State's prosecution was politically motivated, that the State of Nebraska began, from the initial investigation, with either the presumption that David Rice was involved or with the hope that a case could be constructed that would show his involvement. Respondent further submits that the trial was political and was used by the State as an instrument by which respondent's Constitutionally guaranteed right to freedom of speech might be curtailed.

David Rice, at the time of his arrest, was Deputy Minister of Information for the Nebraska chapter of the National Committee to Combat Fascism, an organ of the Black Panther Party. Both as an individual and as a member of this organization, Rice was very critical of the present political and economic System. And he frequently was highly critical of and made inflammatory remarks about the Omaha Police Dept. Aside from the role of political agitation from outside the System, Rice also played a role within the System, as a community worker under the employ of Greater Omaha Community Action(a federally sponsored anti-poverty program) and as a member of the Democratic Central Committee and Democratic co-chairperson of Ward II. Because of his vocal presence in the community of Omaha, he was subjected to frequent acts of intimidation by members of the Omaha Police Dept., to harassment, and to constant surveillance. Respondent contends that his

arrest, trial, and conviction in this instant case constituted the culmination of the various attempts by local(Omaha) officials to "get him off their back." Respondent offers to the Court the following items of evidence to support his contention that his prosecution was politically motivated and constituted a violation of his Constitutionally guaranteed right of freedom of speech.

13b

1. The first indication of respondent's contention is to be found in the illegal warrant for the search of his home: "David Rice is a known member of the National Committee To Combat Fascism, which advocates the violent killing of police officers."

2. Respondent submits to the Court certain statements made by Arthur O'Leary in his opening statement made to the trial court:
(p. 128, lines 1-6; p. 136, line 23-p. 137, line 1)

3. Respondent asks the Court to examine the testimony of Sgt. Swanson relative to the political advocacy of David Rice:
(p. 84, line 1-p. 90, line 14; p. 126, lines 14-23; p. 318, lines 13-15; p. 319, line 3-p. 328, line 8; p. 357, line 11-p. 359, line 22)

BEST COPY AVAILABLE

Respondent contends that the State's purpose in entering into evidence the vast amount of testimony and literature relating to the political beliefs and alleged political beliefs of David Rice and of the organization to which he belonged was to so prejudice the members of the jury that they would be unable to render a decision based upon the real evidence presented in the case. Respondent notes also that this job was made simpler for the State by the make-up of the jurors, who were in no way the peers of David Rice(The jury could be classified as white, middle-aged-to-elderly, and middle-class, while Rice was young, black, and poor).

.....

Respondent concludes this appendix by reiterating to the Court that he is not guilty of the killing of Larry Minard; that he has made every attempt, throughout his appeal process and the trial itself, to maintain his innocence; that the State of Nebraska prosecuted him, not with the intention to bring the guilty to justice, but to obtain a conviction of respondent in retaliation for his espousal of unpopular political beliefs; that the County Attorney's Office, members of the Omaha Police Dept., Judges Hamilton and Simon, et al acted in collusion to obstruct justice in this case; and that the combination of biased pre-trial publicity and the empaneling of a jury that had nothing in common with Rice combined to make a fair trial for respondent impossible.

And lastly, respondent asks that the Court to uphold the rulings of the Eighth Circuit Court of Appeals and the Federal District Court of Judge Warren K. Urbom that respondent be released or re-tried.

Respectfully,

David L. Rice
Respondent

Supreme Court, U. S.
FILED
AUG 9 1975
MICHAEL RODAK, JR., CLERK

Supreme Court, U. S.
FILED
OCT 9 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1055

W. T. STONE, Warden,

Petitioner,

—v.—

LLOYD CHARLES POWELL,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 74-1222

CHARLES L. WOLFE, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

—v.—

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION *AMICUS CURIAE*

LEON FRIEDMAN
Hofstra University
School of Law
Hempstead, N. Y. 11550

MELVIN L. WULF
JOEL M. GORA
American Civil Liberties Union
22 East 40th Street
New York, N. Y. 10016

Attorneys for Amicus Curiae

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	2
Statement of the Cases.	3
Questions Presented	5
Summary of Argument	7
Argument:	
Preliminary Statement.	9
I. There is no compelling reason for restricting the present scope of the habeas corpus writ by eliminating fourth amendment claims	11
II. The enforcement of fourth amendment rights requires continued application of the exclusionary rule.	43
Conclusion.	51

TABLE OF AUTHORITIES

Page

Cases

Aguilar v. State of Texas, 378 U.S. 108 (1963) 26, 27

Blazak v. Eyman, 399 F. Supp. 40 23

Brown v. Allen, 344 U.S. 443 (1953) 7, 9

Cash v. Williams, 455 F. 2d 1227 (6th Circ. 1972). . . . 22

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 19, 20, 29

Fankboner v. Robinson, 391 F. Supp. 542 (W.D. Va 1975) 21

Fay v. Noia, 372 U.S. 391 (1963) 12, 17

Gideon v. Wainwritht, 372 U.S. 335, 351 (1963) 29

Haefeli v. Chernoff, 394. Supp. 1079 (D. Mass. 1975) 18, 19

Harris v. Nelson. 394 U.S. 286, 290-91 (1969) 17

Heffley v. Hocker 420 F. 2d 881 (9th Cir. 1969) 24

Kaufman v. United States, 394 U.S. 217 (1969) . . . 7, 9, 37, 38

Mapp v. Ohio, 367 U.S. 643 (1961) 7, 9, 43

Moffett v. Wainwright 512 F. 2d 496 (5th Cir. 1975). 20

McNabb v. United States, 318 U.S. 332, 340 (1943) 17

O'Berry v. Wainwright, 294 F. Supp. 591 (S.D. Fla. 1975) . 19

O'Berry v. Wainwright, 394 F. Supp. at 593 29

O'Berry v. Wainwright, 300 So. 2d 740 (1974) 19, 28

Patterson v. Lockhart, 513 F. 2d 579 (8th Cir. 1975). 20, 30

People v. DeGrandis, 375 U.S. 868 (1963) 26

Rogers v. Richmond, 365, U.S. 534, 544-45 (1961) 17

Root v. Gauper, 438 F. 2d 361 (8th Cir. 1971) 23

Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973) 11, 12, 17, 39

State of Texas v. Gonzales, 388 F. 2d 145 (5th Cir. 1968) . . . 25

Tabasko v. Barton, 472 F. 2d 871 (6th Cir. 1972) 21

Tabasko v. Ohio, 400 U.S. 998 (1971) 22

United States ex rel Boyance v. Meyers, 398 F. 2d 896 (3d Cir. 1968) 24

United States ex rel Coleman v. Smith, 395 F. Supp. 1155 (W.D. N.Y. 1975) 18

United States ex rel DeForte v. Mancusi, 379 F. 2d 897 (2d Cir. 1967) 26

United States ex rel Manduchi v. Tracy, 233 F. Supp. 423 (E. D. Pa. 1964) 27

United States ex rel DeNigris v. Menser, 360 F. wd 199 (2d Cir. 1966) 26

United States ex rel Nickens v. LaVallee, 279 F. Supp. 248 (S.D.N.Y. 1967) 25

Weeks v. United States, 232 U.S. 383, 391-92 (1914) 45

Other Authorities

Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441 (1963) 12

Hart, "The Supreme Court, 1958 Term. Foreward: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 107-08 (1959) 36

Note, "Developments--Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1060-61 (1970) 34, 35

Oaks, "Legal History in High Court--Habeas Corpus," 64 Mich. L. Rev. 451 (1966) 12

Thomas S. Schrock and Robert C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 300 (1974) 45, 46, 47

Shapiro, "Federal Habeas Corpus: A Study in Massachusetts," 87 Harv. L. Rev. 321 (1973) 30, 31, 32, 33, 36, 37, 41

Tushnet, "Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte," 1975 Wisc. L. Rev. 484, 489 . . . . 13, 16, 42

Wulf, "Limiting Prisoner Access to Habeas Corpus--Assault on the Great Writ," 40 Brooklyn L. Rev. 253, 270-71 (1973) 40, 42, 43, 49, 50

Miscellaneous

Cong. Globe, 39th Cong. 1st Sess. 4151 (1866) 14

In the
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1055

W. T. STONE, WARDEN,
Petitioner
v.
LLOYD CHARLES POWELL,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

No. 74-1222

CHARLES L. WOLFF, JR. WARDEN
NEBRASKA PENAL AND CORRECTIONAL COMPLEX,
Petitioner
v.
DAVID L. RICE,
Respondent

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION
AMICUS CURIAE

Interest of the Amicus Curiae 1/

The American Civil Liberties Union is a nationwide organization with 380,000 members dedicated to the protection of the rights enumerated in the Bill of Rights. It is particularly concerned with the fair operation of the criminal justice system and during its 55-year existence has stressed the need for full protection of the fourth amendment guarantees against unreasonable searches and seizures. It is also concerned with protecting avenues of redress for those alleging violation of their constitutional rights through the writ of habeas corpus. Since these two related cases present serious attacks upon both fourth amendment rights and habeas corpus protection, the ACLU submits this amicus brief.

1/ Letters from all the parties in the two cases consenting to the filing of this brief have been filed with the Clerk of the Court.

Statement of the Cases

Stone v. Powell

The respondent, Lloyd Charles Powell, was convicted of second degree murder arising out of an attempted robbery of a liquor store in San Bernardino, California. The victim, Mary Parsons, was the wife of the manager. In addition to testimony by Mr. Parsons and one of the respondent's companions, the prosecution introduced into evidence the murder weapon. The weapon had been found on the respondent 10 hours after the murder when he was arrested in Henderson, Nevada, for violation of a local vagrancy ordinance. At the trial respondent claimed that the weapon had been seized in violation of his fourth amendment rights since his arrest was invalid because the Henderson vagrancy ordinance was unconstitutional. The California courts upheld the validity of the search and the admission of the gun into evidence. Subsequently, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of California. The petition was denied, but the Court of Appeals for the Ninth Circuit held that the weapon should have been excluded at the murder trial since respondent had been arrested under an unconstitutional vagrancy ordinance.

Rice v. Wolff

Respondent was found guilty in the Nebraska state courts of first degree murder following the bombing death of an Omaha police officer. The police had obtained a search warrant for respondent's house and discovered several items of evidence which were introduced at his trial including blasting caps, dynamite wrappers, some pliers and some dynamite. The search warrant was based on an affidavit of a police officer which recited that the affiant had been informed that dynamite and other devices might be stored at respondent's home. Respondent claimed that the affidavit was insufficient to justify issuance of the warrant, but his motion to suppress the evidence was rejected by the Nebraska courts. However, the United States District Court for the District of Nebraska issued a writ of habeas corpus ordering respondent released from custody on the ground that the search warrant was not based on probable cause since there was no showing that the informant who told police that dynamite could be found in the home was reliable and there was no independent corroboration of that information. On appeal to the Eighth Circuit, the decision ordering release was affirmed.

Questions Presented

In granting the writ of certiorari, this Court requested counsel to brief and argue the following additional question in Stone v. Powell:

> Whether, in light of the fact that the District Court found that the Henderson, Nevada police officer had probable cause to arrest respondent for violation of an ordinance which at the time of the arrest had not been authoritatively determined to be unconstitutional respondent's claim that the gun discovered as a result of the search incident to that arrest violated his rights under the fourth and fourteenth amendments to the United States Constitution is one cognizable under 28 U.S.C. §2254.

In Wolff v. Rice, this Court requested the following additional question to be argued and briefed:

> Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable

under U.S.C. §2254.

This amicus brief is directed solely to this point and will not address itself to the other issues in the respective petitions for certiorari.

SUMMARY OF ARGUMENT

The petitioners ask this Court to take three revolutionary steps in the administration of criminal justice: (1) to overrule Kaufman v. United States 394 U.S. 217 (1969) and eliminate fourth amendment claims from federal habeas corpus; (2) to overrule Mapp v. Ohio, 367 U.S. 643 (1961) and eliminate the exclusionary rule in state criminal prosecutions; and (3) to overrule Brown v. Allen 344 U.S. 443 (1953). None of these steps should be taken, let alone all three.

Federal habeas corpus jurisdiction over fourth amendment claims by state prisoners is necessary for the following reasons:

(1) it comports with the historical purpose of the habeas corpus writ--namely, to allow federal courts to pass upon the violation of federal constitutional rights;

(2) state courts have not properly followed ruling precedents of this Court in fourth amendment cases. As a result many fourth amendment violations go unnoticed and uncorrected and state law enforcement officers are not properly guided in their actions, to the detriment of all citizens;

(3) the availability of the habeas corpus writ often encourages state officials to voluntarily acknowledge constitutional violations, or at the least to instruct state prisoners on how to use available state procedures.

(4) federal habeas corpus jurisdiction is necessary to provide for uniform application of fourth amendment claims.

Furthermore, there would be no savings in federal judicial administration if fourth amendment claims were eliminated. Very little time is spent on all post-conviction claims by federal judges. State prisoners often combine many overlapping claims in their habeas corpus petitions. Federal courts would still have to determine whether state courts provided for a fair hearing on fourth amendment claims.

Finally, there is no reason for eliminating the exclusionary rule at this time. It still constitutes the only effective check on lawless police action in the fourth amendment area, and the courts have an independent constitutional obligation to exclude illegally seized evidence.

ARGUMENT

Preliminary Statement

The petitioners in these cases urge this Court to take not one but three revolutionary steps in the administration of criminal justice. First they explicitly urge the Court to overrule Kaufman v. United States, 394 U.S. 217 (1969), which holds that fourth amendment claims are cognizable in federal habeas corpus. Secondly, they--or the Amici Attorneys General supporting their position--urge this Court to overrule Mapp v. Ohio, 367 U.S. 643 (1961), and to eliminate the exclusionary rule in state criminal prosecutions. Of course, the two arguments are inexorably linked together: if federal courts cannot review fourth amendment claims on federal habeas corpus, there is no effective restraint against fourth amendment violations by state law enforcement officers and the exclusionary rule would necessarily atrophy. Thirdly, the petitioners would revolutionize federal habeas corpus jurisdiction, overrule Brown v. Allen, 344 U.S. 443 (1953) and make state court findings binding on the federal courts. The modest question which this Court had requested the parties to argue would bring about the most fundamental change in the criminal justice system. There is no logical, practical, or constitutional reason why any one of

these three steps be taken, let alone all three of them.

I

THERE IS NO COMPELLING REASON FOR RESTRICTING THE PRESENT SCOPE OF THE HABEAS CORPUS WRIT BY ELIMINATING FOURTH AMENDMENT CLAIMS

This Court's request that counsel brief and argue the question of whether fourth amendment claims should no longer be heard on federal habeas corpus evidently grew out of the concurring opinion of Mr. Justice Powell in Schneckloth v. Bustamonte, 412 U.S. 218, 250 (1973), which suggested the following reasons why federal habeas corpus should not be available to a state prisoner alleging a violation of his fourth amendment rights: (1) the historic purpose of the writ has been expanded far beyond its original purpose; (2) the writ should be restricted to constitutional claims relating to guilt or innocence and fourth amendment claims are "rarely relevant to this reason;" (3) the unprecedented extension of federal habeas corpus has put a great strain on the resources of the federal courts and created friction between the state and federal systems of justice; (5) the value of the exclusionary rule loses its force when claims of fourth amendment violations are made on federal habeas corpus years after the events in question and the deterrent effect on the police becomes negligible.

Each of these arguments must be examined in turn.

A. The historic evidence does not support the notion that federal habeas corpus could be limited to reviewing the violation of only certain constitutional rights.

This Court in Fay v. Noia, 372 U.S. 391 (1963), reviewed the historic background leading to the passage of the Judiciary Act of February 5, 1867 which first extended federal habeas corpus to state prisoners generally. The Court concluded that the habeas corpus power was extended "to what was conceived to be its constitutional limit." 372 U.S. at 417. However, Mr. Justice Powell in Schneckloth cites two law review articles which question this conclusion and claim that the 1867 law was designed to incorporate only the common law uses and functions of the writ. 2/

However, the history at best is inconclusive. A more recent analysis of

2/ Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. 441 (1963); Oaks, "Legal History in High Court -- Habeas Corpus," 64 Mich. L. Rev., 451 (1966)

the historic background 3/ cites statements by sponsors of the habeas corpus act that indicated it was to have the broadest scope. Thus Representative William Lawrence of Ohio said of the purposes of the bill:

> On the 19th of December last, my colleague introduced a resolution instructing the Judiciary Committee to inquire and report to the House as soon as practicable, by bill or otherwise, what legislation is necessary to enable the courts of the United States to enforce the freedom of the wife and children of soldiers of the United States, and also to enforce the liberty of all persons. Judge Ballard, of the district court of Kentucky, decided that there was no act of Congress giving courts of the United States jurisdiction to enforce the rights and liberties of such persons. In pursuance of that resolution of my colleague this bill has been introduced, the effect of which

3/ See Tushnet, "Judicial Revision of the Habeas Corpus Statutes: A Note on Schneckloth v. Bustamonte," 1975 Wisc. L. Rev. 484, 489.

> is to enlarge the privilege of the writ of hobeas [sic] corpus, and to make the jurisdiction of the courts and judges of the United States coextensive with all the powers that can be conferred on them. It is a bill of the largest liberty, and does not interfere with persons in military custody or restrain the writ of habeas corpus at all. Cong. Globe, 39th Cong. 1st Sess. 4151 (1866)

Another sponsor, Senator Lyman Trumbull of Illinois, chairman of the Senate Judiciary Committee, said:

> Now, a person might be held under a State law in violation of the Constitution and laws of the United States, and he ought to have in such a case the benefit of the writ, and we agree that he ought to have recourse to the United States courts to show that he was illegally imprisoned in violation of the Constitution or laws of the United States. Cong. Globe, 39th Cong. 1st Sess. 4229 (1866)

Professor Tushnet concludes:

> The evidence so far hardly supports the contention, belied by the words of the statute and of its sponsors, that the 1867 Act was a minor bit of legislation. The most effective argument in favor of that contention is the failure of anyone to discuss seriously the fact, if it was one, that the bill proposed a major transformation in federal-state relations. Here, however, Representative Lawrence's statement that the bill made the powers of federal courts "coextensive with all the powers that can be conferred on them" begins to make sense. The Civil War was a constitutional decision of the highest magnitude. Every Republican, moderate or radical, knew that a fundamental shift in power from state to federal government had occurred when the Union forces prevailed; disagreements between moderates and radicals concerned the manner in which that shift would be implemented. . . . Everyone involved knew that federal power extended to new areas. Future Congresses would give precise definition to new federal rights, similar to that given by the Civil Rights Act of 1866. It made sense, there-

> fore, to provide an extensive federal remedy for violation of federal rights in general, even though no one could know what the particular rights protected would be. 1975 Wisc. L. Rev. at 490-491.

This analysis precisely fits the words of the habeas corpus statute, 28 U.S.C. §2254, which permit the writ to be issued on behalf of a person in custody "pursuant to the judgment of a state court . . . on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." There is nothing in the words or history of the statute that indicates that the statute would apply with respect to some constitutional rights but not to others. The scope of the constitutional rights involved might change, the basis for review might change, but there is no occasion for distinguishing one right over another once jurisdiction to issue the writ was found.

B. The purpose of the writ is to determine whether a constitutional right has been violated, not whether a prisoner is innocent or guilty.

The heart of Mr. Justice Powell's

opinion in Schneckloth is his suggestion that the habeas corpus writ be available to state prisoners only if they can show that they were in fact innocent of the crime, though he concedes that the traditional test has not been guilt or innocence but only whether a constitutional right has been violated.

That traditional point of view has been expressed time and again in numerous decisions of this Court. In a leading federal habeas corpus case Mr. Justice Frankfurter, speaking for the Court, wrote: "A defendant has the right to be tried according to the substantive and procedural due process requirements of the fourteenth amendment." Rogers v. Richmond, 365 U.S. 534, 544-45 (1961). Elsewhere this Court wrote: "The writ of habeas corpus is the fundamental instrument for safeguarding individual freedom against arbitrary and lawless state action." Harris v. Nelson, 394 U.S. 286, 290-91 (1969). The root principle of habeas corpus is that "government must always be accountable to the judiciary for a man's imprisonment." Fay v. Noia, 372 U.S. 391, 402 (1963). And Mr. Justice Frankfurter pointed out in McNabb v. United States, 318 U.S. 332, 340 (1943): "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence."

It is regrettable but unfortunately true that the state courts cannot be relied upon to enforce fully the constitutional rights of defendants and to maintain the civilized standards of procedure which Justice Frankfurter referred to. In numerous cases fourth amendment claims were presented to state courts and rejected, although the applicable precedents made clear that the fourth amendment had been violated. However on federal habeas corpus, the constitutional claims were upheld. A sample of such cases follows.

United States ex rel Coleman v. Smith, 395 F. Supp. 1155 (W.D.N.Y. 1975). Defendant was found guilty of possession of heroin. He moved to suppress the introduction into evidence of the drugs which had been seized by defendant's parole officer after a search of his apartment without a warrant. The New York courts denied his motion to suppress the evidence on the ground that defendant had consented to the search when signing an "agreement" allowing indiscriminate searches by the authorities as a condition to obtaining parole. The federal district court granted the petition for habeas corpus on the ground that the consent was not voluntary.

Haefeli v. Chernoff, 394 F. Supp. 1079 (D. Mass. 1975). Defendant had been indicted and convicted of receiving

stolen property. He moved to suppress the introduction into evidence of certain checks which had been seized from his parked car. The Massachusetts courts denied his motion, but the federal district court granted his petition for habeas corpus on the ground that there was nothing plainly or immediately incriminating about the checks when the police observed them from outside the car so that the "plain view" doctrine did not apply. He was arrested far away from his parked car so the search was not incident to the arrest and the automobile exception did not apply since the car was not mobile.

O'Berry v. Wainwright, 294 F. Supp. 591 (S.D. Fla. 1975). Defendant was found guilty of rape. After his arrest, the police without a warrant seized his car which was parked in his driveway. A detective later testified that there were wipe marks on the rear seat. The defendant moved to suppress any evidence or testimony relating to the car on the ground that it had been illegally seized. Despite the fact that the case was virtually identical to this Court's decision in Coolidge v. New Hampshire, 403 U.S. 443 (1971), the Florida courts refused to suppress the evidence or testimony. O'Berry v. Wainwright, 300 So. 2d 740 (1974) The federal district court granted a petition for habeas corpus on the ground that the case was identical

to and governed by the Coolidge case.

Moffett v. Wainwright, 512 F. 2d 496 (5th Cir. 1975). Defendant was found guilty of armed robbery. He had been arrested for vagrancy and two police officers went to his apartment accompanied by a female friend of the defendant where they found two young girls. The police asked for permission to search the apartment and later testified that the women consented to the search. Certain incriminating evidence was found and later introduced into evidence. The trial court considered the search and determined it was constitutional, but on a habeas corpus petition, the Fifth Circuit held that the state failed to prove that the search had been consented to by third parties with sufficient rights to the premises.

Patterson v. Lockhart, 513 F. 2d 579 (8th Cir. 1975). Defendant was convicted in the Arkansas state courts of possession of stolen property. The state courts rejected a motion to suppress certain evidence based on defendant's claim that the affidavits presented in support of the search warrants were insufficient. A habeas corpus petition was filed in federal district court and denied, but on appeal to the Eighth Circuit, the state confessed error, admitting that the affidavits were insufficient. The Court of Appeals commented: "It is difficult

to understand why the state has failed to confess error until this late date. The search warrant was defended in the state courts as well as in the federal district court. The state even defended the legality of the search in briefs filed in this court. Three affidavits were presented in support of the warrant. They were all conclusory and clearly insufficient." 513 F. 2d at 580, n.2.

Fankboner v. Robinson, 391 F. Supp. 542 (W.D. Va. 1975). Defendant was found guilty in the Virginia state courts of possessing a sawed-off shotgun. Two police officers had gone to defendant's apartment, knocked on his door, identified themselves and asked whether they could talk to him for a few minutes. When defendant said "sure," they entered his apartment, saw the sawed-off shotgun on a refrigerator and arrested defendant. The state courts denied a motion to suppress, stating that defendant had consented to the entry. The federal district court granted the habeas petition on the ground that the defendant never consented to the police entry.

Tabasko v. Barton, 472 F. 2d 871 (6th Cir. 1972). Defendant was found guilty in the Ohio state courts of possession of narcotics. Certain evidence introduced at the trial had been seized pursuant to a search warrant. The Ohio court rejected a motion to suppress the

evidence based on defendant's claim that the affidavit in support of the warrant was insufficient. A petition for certiorari to this Court was denied, Tabasko v. Ohio, 400 U.S. 998 (1971). On a petition for habeas corpus, the Sixth Circuit held that the affidavits were conclusory and insufficient and that additional oral testimony submitted to the magistrate to establish probable cause did not make up the deficiency in the affidavit since it was not taken under oath.

Cash v. Williams, 455 F. 2d 1227 (6th Cir. 1972). Defendant was found guilty in the Tennessee state courts of possession of marijuana. The marijuana had been found by the police after the defendant's car had been impounded by a deputy sheriff following an arrest of defendant's brother-in-law for driving without a license. The Tennessee courts upheld the validity of the search of the car made by a wrecker operator who had taken the car to his garage at the direction of the deputy. A petition for certiorari to this Court was denied. 400 U.S. 995 (1971) On federal habeas corpus, the Sixth Circuit held that the wrecker operator was an agent of the police and that the search of the car was illegal since it was not incident to an arrest, there was no reason to inventory the contents of the car, and the opportunity to search the car was not "fleeting."

Blazak v. Eyman, 399 F. Supp 40 (D. Ariz. 1971). Defendant was convicted of possession of marijuana in the Arizona courts. The police, who had received a tip that the defendant was in possession of narcotics and also learned that his driver's license had been suspended, observed him in a gas station but waited until he was driving his car before they arrested him for driving with a suspended license. They found some marijuana on his person. The state courts rejected defendant's claim that the evidence should have been suppressed because the arrest was a pretext. However, the federal district court granted the petition for habeas corpus on the ground that the arrest was made solely for the purpose of discovering evidence to support another charge.

Root v. Gauper, 438 F. 2d 361 (8th Cir. 1971). Defendant was found guilty of manslaughter in the killing of her husband. The police had entered the defendant's home without a warrant and seized a shotgun and some shells which were introduced into evidence at her trial. The entry had been made after the victim had been removed to the hospital and when no one else was in the home. The Missouri courts held that the entry was justified as an emergency, but the Eighth Circuit granted the habeas corpus petition on the ground that the police knew the victim had

already been removed from the home and there was no reason to believe there were any other persons in need of aid, and thus the entry and seizure violated the fourth amendment.

Heffley v. Hocker, 420 F. 2d 881 (9th Cir. 1969). Defendant was found guilty of burglary in the Nevada state courts. Certain documents which had been stolen were found under some guns and other paraphernalia in the rear of defendant's car which had been seized after his arrest for illegal possession of the guns. The car was searched at the police station without a warrant after the arrest. The Nevada state courts upheld the search, claiming it was an inventory search. The Ninth Circuit granted the writ of habeas corpus on the ground that the search was exploratory and was not made to protect or inventory defendant's possessions since the police officer testified he looked "under the hood, wheels everything."

United States ex rel Boyance v. Meyers, 398 F. 2d 896 (3d Cir. 1968). Defendant had been found guilty of burglary. Certain evidence introduced at his trial was seized pursuant to a search warrant which specified that the search be made in the daytime; nevertheless, the search and seizure took place in defendant's family home at 2:30 A.M. The state courts upheld the seizure of the incrim-

inating evidence, but the Third Circuit granted the petition for habeas corpus on the ground that the explicit limitation of the warrant to a daytime search could not be disregarded by the police.

State of Texas v. Gonzales, 388 F. 2d 145 (5th Cir. 1968). Defendant was found guilty in the Texas state courts of possession of heroin. The police having received a tip that narcotics were being peddled at a certain home, an officer went to the house, walked around the yard to peer into the window, and stood on a drain pipe outside another window to see what was going on. He observed white powder on the table. The police then arrested all those in the house at the time including the defendant. The Texas courts upheld the validity of the arrest and the seizure of the heroin, but the Fifth Circuit granted the petition for habeas corpus on the ground that the police lacked probable cause to peer into the windows from close vantage points on the property.

United States ex rel Nickens v. LaVallee, 279 F. Supp. 248 (S.D.N.Y 1967). Defendant was found guilty of burglary in the New York state courts. Certain incriminating evidence had been seized by the police without a warrant at the defendant's apartment after he had been arrested and booked. The state courts refused to suppress the evidence, but the

federal district court granted the habeas corpus petition on the ground that the search was not incident to the arrest since it was made long after the defendant had been removed from his apartment.

United States ex rel DeForte v. Mancusi, 379 F. 2d 897 (2d Cir. 1967). Defendant had been found guilty of conspiracy and extortion in the New York state courts. Various union books and records had been seized without a warrant and introduced into evidence against him. The state admitted that the seizure was illegal but claimed that defendant lacked standing to complain. The state courts refused to suppress the evidence, and certiorari to this court was denied. People v. DeGrandis, 375 U.S. 868 (1963) The Second Circuit granted the petition for habeas corpus on the ground that the defendant had standing to complain of the illegal search since it was directed against him in his normal place of business in which he spent a considerable part of each day.

United States ex rel DeNigris v. Menser, 360 F. 2d 199 (2d Cir. 1966). Defendant was found guilty of pool selling (gambling) in the Connecticut state courts. Certain evidence had been seized pursuant to a search warrant which the defendant claimed was invalid since the affidavit upon which it was based was insufficient under Aguilar v. State of

Texas, 378 U.S. 108 (1963). The state courts rejected the claim, but the Second Circuit granted the writ of habeas corpus on the ground that the affidavit was insufficient and the magistrate did not personally determine the existence of probable cause for the search.

United States ex rel Manduchi v. Tracy, 233 F. Supp. 423 (E.D. Pa. 1964). Defendant was found guilty of bookmaking in the Pennsylvania state courts. Certain evidence had been seized pursuant to a search warrant. The police officers arrived at the defendant's apartment, knocked, heard a "scuffling noise" inside, and then proceeded to knock down the front door with a sledge hammer. At the same time two other detectives broke open another door to the apartment with a section of a wooden telephone pole. The state courts upheld the validity of the search, but the federal district court granted a writ of habeas corpus on the ground that the search was invalid since the officers did not announce their authority and purpose prior to the entry and had no justification for dispensing with the announcement.

These cases lead to three inescapable conclusions:

(1) Many fourth amendment violations

would go completely unnoticed and uncorrected if the federal writ of habeas corpus were not available to review fourth amendment claims of state prisoners. It is obvious that this Court cannot hope to review all the fourth amendment claims that come to it directly from the state courts on certiorari. Thus without federal habeas corpus many of the egregious fourth amendment claims described above--the crashing into a person's home with a sledge hammer and a telephone pole without announcement, the searching of a person's apartment without a warrant after he was arrested and booked, the pretext and sham arrest to justify a warrantless search--would have been ignored. It is not only the particular defendants involved who would suffer from this lack of oversight. Without the guidance of the federal courts as to what constitutes an illegal search under the fourth amendment, the state authorities themselves do not know the limits of their authority. And ultimately the privacy of all our citizens falls into jeopardy.

(2) Many state courts appear to be either ignorant of or unsympathetic to fourth amendment claims. Possible reasons for this lack of sympathy are described below. But the fact that it exists seems unquestioned. Otherwise there was no reason for the Florida courts in the O'Berry case to ignore totally a

decision of this Court in the Coolidge case which was directly in point. As the district court noted in that case: ..."it is a rare case in which the Supreme Court has previously ruled on a virtually identical set of facts. In all material respects, however, this case is the same as Coolidge." O'Berry v. Wainwright, 394 F. Supp. at 593. In a similar situation some years ago, this Court overturned the "special circumstances" rule in right to counsel cases and established a blanket rule requiring appointment of counsel in all cases. One reason for the change was that it appeared that the state courts were not following guiding precedents of the federal courts in sixth amendment cases. As Justice Harlan explained the situation:

> This evolution [expanding the special circumstances rule to more and more situations] appears not to have been fully recognized by many state courts, in this instance charged with the front line responsibility for the enforcement of constitutional rights. Gideon v. Wainwright, 372 U.S. 335, 351 (1963) (Harlan, J., concurring)

Where the state courts have failed their "front line responsibility," removal of the only effective check on their actions would have the most serious constitutional consequences.

(3) The cases described above indicate that there are other salutory effects from federal habeas corpus jurisdiction in fourth amendment claims. In some situations, the mere availability of the writ may lead the state authorities to acknowledge fourth amendment violations voluntarily. In the Patterson case, supra, the state confessed error for the first time when on appeal to the Fifth Circuit. In a comprehensive study of federal habeas corpus petitions in Massachusetts (Shapiro, "Federal Habeas Corpus: A Study in Massachusetts," 87 Har. L. Rev. 321 (1973)), Prof. David L. Shapiro pointed out:

> There were a number of cases in which a petitioner made a significant gain even though the matter prayed for was not granted. Perhaps the clearest case was one in which petitioner, one Miller, alleged that he had been sentenced by a state district court without trial, plea or counsel, and had been unable to obtain any redress in the state courts. Following appointment of counsel to represent him, the petitioner was voluntarily released by state authorities without condition of probation, parole, or retrial. In a letter

> to the federal court, Miller's appointed attorney said that although the dismissal "avoids some very serious constitutional issues involved in [state] District Court procedure," the disposition is "in the best interests of my client." Miller himself wrote to Judge Wyzanski that until the federal action had had its impact, "I had lost my faith in the American system of justice." 87 Harv. L. Rev. at 340-41

Professor Shapiro describes other benefits of federal habeas:

> Other, more frequent, instances were less dramatic but significant in their own right. Thus there were many cases in which for any number of reasons--ranging from the prisoner's ignorance, to his counsel's inattention, to the default of state court officials--state court postconviction proceses had ground to a halt and the federal petition was instrumental in getting them started again. In one case, for example, the petitioner filed a pro se state habeas corpus petition in December 1970; it was not acknowledged by the clerk until October 1971,

and nothing further happened until a federal petition was filed in March 1972. At that point, a state court hearing on the question of appointment of counsel was scheduled and the federal action dismissed for failure to exhasust. In another case, the petitioner had been unable to obtain state appellate review because, despite a state law directing the clerk to prepare a summary of the record "forthwith," 44 months had passed without completion of the summary. A federal hearing was held, assurances were given that the case would go forward promptly, and the district court retained jurisdiction pending completion of the appeal within a reasonable time. Ibid. at 341

He concludes:

> In still other cases, the question was not one of mere delay in the state courts; rather the petitioner was unrepresented and not sufficiently familiar with the exhaustion requirement, or with the procedures to be followed in the state courts, to obtain relief. As a result of the filing of a federal

> petition, the court itself, the respondent, or appointed counsel would indicate to the petitioner the route to be followed in the state courts, and in some instances appointed counsel might even continue the representation in those courts.

In sum, there are a substantial number of cases--difficult to count because they are not often disclosed by the face of the record--where habeas corpus proves a useful remedy even though the matter prayed for is not granted. For the most part, these are cases in which state processes have for one reason or another been derailed and federal assistance has been helpful in getting them back on the track--cases in which even the most vigorous critics agree that habeas corpus has an important function to perform. Ibid. at 341-42.

There are a number of reasons why federal habeas corpus jurisdiction is so important for maintaining civilized standards of procedure.

(1) It seems unquestioned that the state courts do in fact look unsympathet-

ically on fourth amendment claims. As a leading law review note on the problem has indicated:

> state judges may be inclined unduly to reflect in their decisions the substantive goals of the state criminal law, primarily focusing on ensuring that the guilty are punished and on protecting society by their detention. To a state trial judge, the goals of the Federal Constitution in protecting individual rights from unlawful government action may appear less important than a conviction in any given case. The federal habeas court, however, is lodged in a different institutional setting, with different loyalties and assumptions which may foster greater hospitality to constitutional goals. In some sense, the federal judge's primary allegiance to the Constitution may be weakened by his proximity to the state's enforcement of its criminal law. The federal forum, therefore, may be preferable for the separate proceeding which tests the constitutional basis of the conviction, not the prisoner's guilt or innocence. Note, Developments--

> Federal Habeas Corpus," 83 Harv. L. Rev. 1038, 1060-61 (1970)

(2) In addition, federal habeas corpus jurisdiction in fourth amendment cases provides for more uniform application of fourth amendment claims. As the Harvard Law Review note states:

> providing a federal forum creates a greater likelihood of uniform application of federal constitutional law to all state prisoners. Not only is the possibility of local disregard of federally protected interests lessened, but also the appellate supervision of the federal district courts by the eleven federal courts of appeal provides a cohesive influence in the federal judicial system not present when fifty independent state judicial systems interpret constitutional law. The Supreme Court's review of state decisions cannot systematically induce this sort of uniformity, for the practical burden is too great. Ibid. at 1061

(3) Finally, there should be an opportunity for the federal courts to review federal constitutional claims for the very reason why federal courts were established in the first place. Prof.

Henry Hart explained the principle as follows in discussing the rationale of Brown v. Allen, 344 U.S. 443 (1953):

> [Brown] can be both explained and justified as resting on the principle that a state prisoner ought to have an opportunity for a hearing on a federal constitutional claim in a federal constitutional court, and that, if the Supreme Court in its discretion denies this opportunity on petition for certiorari, it ought to be available on federal habeas corpus in a federal district court. Hart, "The Supreme Court, 1958 Term. Foreward: The Time Chart of the Justices," 73 Harv. L. Rev. 84, 107-08 (1959)

Prof. Shapiro notes:

> My conversations with lawyers and with prisoners leave me with the distinct impression that...there is value in having independent, relatively disinterested federal confirmation of the correctness of a state conviction, in that there is one guaranteed federal review of the federal questions that are now bound to arise in so

> many criminal cases. Shapiro, supra, 87 Harv. L. Rev. at 342

For all of these reasons, federal habeas corpus is necessary not only to insure that the innocent go free but that the state governments do not violate the civilized standards of procedure embodied in the Constitution.

This was precisely the rationale of this Court when it held that fourth amendment claims could be asserted under 28 U.S.C. §2255. In Kaufman v. United States 394 U.S. 217, 226, the Court said:

> The opportunity to assert federal rights in a federal forum is clearly not the sole justification for federal post-conviction relief; otherwise there would be no need to make such relief available to federal prisoners at all. The provision of federal collateral remedies rests more fundamentally upon a recognition that adequate protection of constitutional rights relating to the criminal trial process requires the continuing availability of a mechanism for relief. This is no less true for federal prisoners than it is for state prisoners.

It is interesting to note that the Solicitor General in the Kaufman case acknowledged that federal habeas corpus should be available to state court prisoners asserting fourth amendment rights even when he argued that it should not be available to federal prisoners. This Court summarized the four arguments in support of that position as follows:

> the necessity that federal courts have the "last say" with respect to questions of federal law, the inadequacy of state procedures to raise and preserve federal claims, the concern that state judges may be unsympathetic to federally created rights, the institutional constraints on the exercise of this Court's certiorari jurisdiction to review state convictions. 394 U.S. at 225-26.

All of those reasons continue to apply. This Court's judgment in Kaufman was correct and nothing has happened in the intervening years to justify overruling its decision.

C. Eliminating fourth amendment claims from federal habeas corpus would not appreciably reduce the workload of the federal courts nor reduce the

strain between the state and federal systems of criminal justice.

Mr. Justice Powell suggested in Schneckloth that eliminating fourth amendment claims from federal habeas corpus would lead to more effective utilization of the limited judicial resources of the federal courts. He also claimed that it might also minimize the friction between the state and federal criminal justice systems and lead to finality in criminal trials. All of these conclusions are of dubious validity.

(1) The available statistics indicate that the total amount of time spent by the federal courts on habeas corpus petitions is, unfortunately, quite limited. The Annual Reports of the Director of the Administrative Office of the United States Courts indicate that a very small percentage of the habeas corpus petitions actually go to trial. In 1972 only 3% went to trial. In 1973 the figure was less than 3% and for the first six months of 1974 slightly over 3% 4/ A 1971 study by the Federal Judicial Center indicated that about 5% of the time of the 62 federal

---

4/ See Table C-5b of the Annual Reports of the Director of the Administrative Office of the United States.

judges surveyed were spent on post-conviction cases. 5/ These included both §2254 and §2255 cases as well as suits challenging prison conditions. Professor

5/ See Wulf, "Limiting Prisoner Access to Habeas Corpus--Assault on the Great Writ," 40 Brooklyn L. Rev. 253, 270-71 (1973) Mr. Wulf adds:

> But bare statistics do not tell the entire sotry, for, once closely examined, they are less of a burden than would appear. Assuming, however, that post-conviction petitions continue to be a burden on the courts, one must nonetheless contrast that burden upon judges' time with the social interests which underlie the entire scheme of federal post-conviction review, and contrast it also with the relative importance of other demands made upon the federal judiciary by other classes of cases. Even if one concedes that the federal judges must now work under intolerable pressure, it might be more reasonable to consider restricting diversity of jurisdiction, for example, than to restrict the scope of habeas corpus. Ibid at 256.

Shapiro questioned some of the figures of the Administrative Office but concluded that however one defined the nature of the hearing, they tended to be short: ". . . at least 75 of the hearings [that were surveyed in Massachusetts] were completed in one-half day or less, an additional 10 in one day or less and only 9 . . . in excess of one day." Shapiro, supra, 87 Harv. L. Rev. at 337.

(2) It is almost impossible to predict how many fewer habeas corpus petitions would be filed if fourth amendment claims were eliminated. Prof. Shapiro's study indicated that the petitions almost always contain many overlapping claims--fourth amendment violations, ineffective assistance of counsel, pretrial identification problems, and so on. Eliminating only one claim in such a list would not reduce judicial time.

(3) Furthermore, Mr. Justice Powell's formulation would require the federal courts to spend additional time considering a new question which they have not had to worry about under the present system, namely "whether the prisoner was provided a fair opportunity to raise and have adjudicated the fourth amendment question in state courts." 412 U.S. at 250. It is at least arguable that the federal courts would have to spend more time debating that question than they now spend considering the merits of the

fourth amendment claim.

In such a situation, the friction between the state and federal courts could hardly be expected to decrease. If the federal courts may still consider fourth amendment claims when the state failed to consider defendant's contentions, the state courts would be likely to resent the situation even more than they do now" because of the clear implication of state court inadequacy." Tushnet, supra, 1975 Wisc. L. Rev. at 496.

Finally, as Mr. Wulf has written:

One must think of the power of habeas corpus as the functional equivalent of the criminal law. In recognition of the defective nature of human behavior, society undertakes to control that behavior by adopting criminal codes which threaten sanctions against those who violate norms of conduct. The hope, which is largely realized, is that the criminal law will deter criminal conduct. Likewise, judges and law-enforcement officials, who are susceptible at least to some of the behavior defects found in the public at large, are surely deterred from misbehaving in the constitutional

sense by the existence of a legal structure which can effectively subject their behavior to review and control. The appellate courts perform this role within each state's legal system. But the availability of effective review and control by the federal courts, more keenly attuned to the notions of justice embedded in the United States Constitution, is an indispensable part of the system of law enforcement. It is important to the maintenance of federal constitutional standards that that system not be dismantled. 40 Brooklyn L. Rev. at 272.

II

THE ENFORCEMENT OF FOURTH AMENDMENT RIGHTS REQUIRES CONTINUED APPLICATION OF THE EXCLUSIONARY RULE

The Attorneys General who have submitted amici briefs in these cases have seized the occasion to make a frontal attack on Mapp v. Ohio, 367 U.S. 643 (1961), and the continued utility of the exclusionary rule. Of course there is nothing in the two cases that requires

this Court to consider the question, but the instincts of the amici seem quite correct: if federal courts cannot consider fourth amendment claims on habeas corpus, then the one effective remedy for enforcing fourth amendment rights will be eliminated and the exclusionary rule is sure to atrophy and therefore should be attacked directly.

The petitioners' briefs cite numerous books, articles and judicial declarations about the rationale of the exclusionary rule. Much of the debate about the rule focuses on the search for a single principle to explain its purpose: police deterrence, judicial integrity or personal rights.

At this point, however, it is still unquestioned that the exclusionary rule is the only effective manner of enforcing fourth amendment rights at any level of the criminal justice system. Thus this Court has been correct in its consistent holding that the exclusionary rule is a necessary first condition in any judicial program for enforcing fourth amendment rights.

It is important to recognize that the exclusionary rule is directed not only at illegal police conduct, but at the violation of constitutional liberties by the entire criminal justice system. Thus the exclusionary rule is not truly

a sanction directed at the individual police officer, either by its terms or by its effect. The rule exists to enforce the fourth amendment throughout the criminal justice system, from the officer on the beat, to the prosecutor, to the trial judge. As Mr. Justice Day said in Weeks v. United States, 232 U.S. 383, 391-92 (1914):

> The effect of the fourth amendment is to put the courts of the United States and federal officials, in the exercise of their power and authority, under limitations and restraints as to the exercise of such power and authority, and to forever secure the people. . . against all unreasonable searches and seizures under the guise of law. This protection reaches all alike, whether accused of crime or not, and the duty of giving it force and effect is obligatory upon all entrusted under our Federal system with the enforcement of the laws.

A leading law review article on the exclusionary rule has pointed out that the courts and the police officers are not "moral strangers . . . but . . . parts of the same government and parties to the same governmental course of conduct

and, indeed, neither a criminal court nor a law enforcement officer makes sense in isolation of the other. A criminal court is not an intelligible institution without the expectation that it will receive evidence from which to synthesize verdicts and judgments. By the same token, a policeman--e.g., the marshal in Weeks--may be out in the field, but his being out there in a law enforcement, as opposed to some administrative, capacity is only intelligible on the expectation that he will come in to court." Thomas S. Schrock and Robert C. Welsh, "Up from Calandra: The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. 251, 300 (1974). The authors go on to say:

> The exclusionary thrust of the amendment is not just an impersonal proscription of the use of unreasonably seized evidence; the amendment recognizes an exclusionary right in the defendant, a right that is conceptually and morally part and parcel with the right to be free from unreasonable searches and seizures. To put it as intransigently, and correctly, as we know how, the basic right is to be free from the entire transaction; the right to exclusion and the right to be free from the original invasion are

> coordinate components of that embracing right. Id. at 300-301.

The authors conclude:

> And for any part of the government to commit a wrong denominated as such by the fourth amendment is not just to do wrong in the abstract, but to violate a person's consitutional right.
>
> * * *
>
> This duty of judicial review is, we shall argue, the correlative of the defendant's due process right to have the law of the land applied in his case: he has a right to have the court sitting in his case consult the Constitution when executive conduct related to his case is challenged under any of its parts. And when search and seizure conduct is successfully challenged as unreasonable, he has a due process right to exclusion of the disputed evidence, because exclusion is the only concrete expression which adverse judicial review of unreasonable search and seizure can take. Ibid at 302, 308-09.

But even if this Court accepts the

notion that deterrence is the crucial basis on which the exclusionary rule rests it must still come to the conclusion that fourth amendment rights must be asserted on federal habeas corpus. The simple answer to Mr. Justice Powell's speculation that state officers may not be deterred from illegal searches because of the availability of federal habeas corpus is that the state courts, by not enforcing the fourth amendment, are certainly not deterring them. The survey of cases above shows a lack of sympathy by the state courts to fourth amendment claims. It is only because federal habeas corpus has been available to tell the state courts how to interpret the fourth amendment that the situation is not worse than it is. Thus the only way police officers can be deterred from more constitutional violations is by continuous instruction to the state courts by the federal courts in habeas corpus petitions as to how the fourth amendment should be interpreted.

Finally, petitions have suggested that because this Court has not given retroactive effect to certain fourth amendment decisions, then, by analogy, it is proper also to limit habeas corpus jurisdiction in this area. However the considerations relating to retroactivity have nothing to do with habeas corpus. As Mr. Wulf has written:

Giving a decision retroactive effect bestows a windfall benefit upon a defendant, and prejudices the state which secured a conviction in compliance with all constitutional requirements which were applicable at the time of prosecution. Even then, however, the Supreme Court, in the spirit of fairness, has held that a new constitutional rule must be applied retroactively if it might have affected the determination of guilt or innocence. But that policy has no relevancy to the question of whether a defendant was denied an existing constitutional right at the time of his trial and conviction. In that circumstance, the only issue is whether the state will be permitted to escape the enforcement of a constitutional rule (and its underlying policy) which it was obliged to recognize, such as the exclusionary rules under the fourth and fifth amendment and the rule which guarantees a suspect the right to counsel at interrogation.

While there may be some reason not to compel the application of new rules to old prosecutions, there is surely no

excuse for allowing law enforcement officers to evade known rules by withdrawing the power of the federal courts to enforce them, thus leaving the states free to treat those rules as if they did not exist. 40 Brooklyn L. Rev. at 255-56

CONCLUSION

For the reasons noted above, the Court should hold that fourth amendment claims continue to be cognizable under 28 U.S.C. §2254.

Respectfully submitted,

Leon Friedman
Hofstra University
School of Law
Hempstead, New York 11550

Melvin L. Wulf
Joel M. Gora
American Civil Liberties Union
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

Amicus wish to acknowledge the assistance of Lawrence Mullman, a second year student at the Hofstra Law School, in the preparation of the brief.

Supreme Court, U. S.
FILED
AUG 8 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. (212) 488-6044

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

TABLE OF CONTENTS

PAGE

Statement of Interest of Amicus State of New York 1

ARGUMENT—The exclusionary rule is best served in search warrant cases by affording the prosecution an opportunity to show that the police in fact had probable cause to obtain a warrant 2

Conclusion 10

CASES

Aguilar v. *Texas*, 378 U.S. 108 (1964) 4, 5

Boyer v. *Arizona*, 455 F. 2d 804 (9th Cir. 1972) 4

Brinegar v. *United States*, 338 U.S. 160 (1949) 6

Campbell v. *Minnesota*, 487 F. 2d 1 (8th Cir. 1973) ... 4

Coolidge v. *New Hampshire*, 403 U.S. 443 (1971) 3

Draper v. *United States*, 358 U.S. 307 (1959) 6

Elkins v. *United States*, 364 U.S. 206 (1960) 2, 3, 9

Giordenello v. *United States*, 357 U.S. 480 (1958) 3, 4

Johnson v. *United States*, 333 U.S. 10 (1948) 3

Michigan v. *Tucker*, 417 U.S. 433 (1974) 8

Naples v. *Maxwell*, 393 F. 2d 615 (6th Cir. 1968) 4

Oregon v. *Hass*, —— U.S. ——, 43 U.S.L.W. 4417 (March 19, 1975) 4

People v. *Alfinito*, 16 N Y 2d 181, 211 N.E. 2d 644 (1965) 6

People v. *Cameron*, 40 A D 2d 1034, 333 N.Y.S. 2d 12 (2d Dept. 1972) 6

PAGE

People v. *DeFore*, 242 N.Y. 13, 150 N.E. 585 (1926) .. 3

Schneckloth v. *Bustamonte*, 412 U.S. 218 (1973) 7, 9

Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 9

State v. *Rice*, 188 Neb. 728, 199 N.W. 2d 480 (1972) 3, 7, 8

United States ex rel. Gaugler v. *Brierley*, 477 F. 2d 516 (3d Cir. 1973) 4

United States ex rel. Pugach v. *Mancusi*, 411 F. 2d 177 (2d Cir.), *cert. denied* 396 U.S. 889 (1969) ... 4

United States ex rel. Rogers v. *Warden*, 381 F. 2d 209 (2d Cir. 1967) 9

United States v. *Calandra*, 414 U.S. 338 (1974) 2

United States v. *Carmichael*, 489 F. 2d 983 (7th Cir. 1973) (en banc) 5

United States v. *Dunning*, 425 F. 2d 836 (2d Cir. 1969) 5

United States v. *Marihart*, 492 F. 2d 897 (8th Cir. 1974) 5, 6

United States v. *Ventresca*, 380 U.S. 102 (1965) 4

Whiteley v. *Warden*, 401 U.S. 560 (1971) 4, 7

STATUTES

Federal Rules of Criminal Procedure, 41(c) 5

New York Criminal Procedure Law § 690.05(1) 4

New York Criminal Procedure Law § 690.40 5

New York Executive Law § 63 2

MISCELLANEOUS

Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide for Federal Magistrates," 64 J. Crim. L. 270 (1973) 5

IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF ATTORNEY GENERAL OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Statement of Interest of Amicus State of New York

The petitioner in the instant case is asking this Court to determine *inter alia*, (a) whether the exclusionary rule should be "modified to admit relevant, competent evidence" where the police have acted in good faith under "exigent circumstances" and application of the rule would serve no

valid purpose and (b) whether a search warrant which is deficient on its face may be cured by adducing additional evidence at the suppression hearing to show that the police in fact had probable cause to obtain the warrant. These questions are of direct and substantial interest to the Attorney General of the State of New York. As the chief legal officer of the State of New York (N.Y. Executive Law § 63), the Attorney General is concerned with maintaining an equitable balance between effective law enforcement to protect society against crime and the observance of procedural due process in the administration of criminal justice. In the context of the instant case, we believe that this balance is best achieved by permitting rehabilitation of the affidavit and, to this extent, limiting the application of the exclusionary rule.

ARGUMENT

The exclusionary rule is best served in search warrant cases by affording the prosecution an opportunity to show that the police in fact had probable cause to obtain a warrant.

The avowed purpose of the exclusionary rule fashioned by this Court is "to deter future unlawful police conduct." *United States* v. *Calandra,* 414 U.S. 338, 347 (1974); *Elkins* v. *United States,* 364 U.S. 206, 217 (1960). Too often, however, the rule is applied without reference to this purpose, resulting in a windfall to the criminal defendant. This is most likely to occur in cases where, as here, the evidence excluded has been obtained pursuant to a warrant issued by a neutral magistrate. In such cases, the villain of the piece—if there can truly be said to be one—is not the policeman who, in good faith, followed the injunction

of this Court to seek a warrant before conducting his search, but the judicial officer who found the affidavit in support of the warrant to be legally adequate. To paraphrase Justice Cardozo's classic statement in *People* v. *DeFore,* 242 N.Y. 13, 21, 150 N.E. 585, 587 (1926), in these cases it is not the "constable" who "blundered" but the magistrate.

The remedy for the anomaly of applying the exclusionary rule in search warrant cases like the instant one should lie in affording the prosecution an opportunity to show, if it can, that the police in fact had sufficient information available to them at the time they applied for the warrant to constitute probable cause for its issuance. This approach, which was taken by the Nebraska state courts (*State* v. *Rice,* 188 Neb. 728, 199 N.W. 2d 480 [1972]) but specifically rejected by the federal courts which invalidated respondent's conviction, would result in a more meaningful use of the exclusionary rule.

This Court has frequently stated that:

> "When the right of privacy must reasonably yield to the right of search is, as a rule to be decided by a judicial officer, not by a policeman or government enforcing agent."

Johnson v. *United States,* 333 U.S. 10, 13-14 (1948); *Coolidge* v. *New Hampshire,* 403 U.S. 443, 449 (1971).

> "The [judicial officer] must judge for himself the persuasiveness of the facts relied upon by a complaining officer to show probable cause. He should not accept without question the complainant's mere conclusion." *Giordenello* v. *United States,* 357 U.S. 480, 486 (1958).

The Magistrate is thus viewed as a neutral buffer against possible police excesses. In practice, however, the exclusionary rule is applied in search warrant cases as if the Magistrate were a passive figure, incapable of making an independent judgment as to the sufficiency of an affidavit before him. Implicit in this application of the rule is the assumption that it was the policeman who acted improperly—in most cases by providing too little information. Presumably, therefore, the rule is being applied to deter him from poor draftsmanship in the future.

It is apparent that this result is unrealistic. The policeman who has applied for a warrant has already, to this extent, been deterred. Compare *Oregon* v. *Hass*, —— U.S. ——, 43 U.S.L.W. 4417, 4420 (March 19, 1975). At this point, the responsibility properly shifts to the judicial officer before whom he appears.* Unlike the policeman who is a nonlawyer (*United States* v. *Ventresca*, 380 U.S. 102, 108 [1965]), the judicial officer may be expected to have a better understanding of what the law requires. It is for him to determine whether or not it is necessary to elicit further information before he issues a warrant. *Whiteley* v. *Warden*, 401 U.S. 560, 565, n. 8 (1971); *Aguilar* v. *Texas*, 378 U.S. 108, 109, n. 1 (1964). See also *Naples* v. *Maxwell*, 393 F. 2d 615 (6th Cir. 1968); *United States ex rel. Pugach* v. *Mancusi*, 411 F. 2d 177 (2d Cir.), *cert. denied* 396 U.S. 889 (1969); *United States ex rel. Gaugler* v. *Brierley*, 477 F. 2d 516 (3d Cir. 1973); *Campbell* v. *Minnesota*, 487 F. 2d 1 (8th Cir. 1973); *Boyer* v. *Arizona*, 455 F. 2d 804 (9th Cir. 1972), all of which hold that sworn oral testimony before a state magistrate on an application for a warrant may constitutionally supplement an affidavit which, on its face, does not establish probable cause.*

* In New York a search warrant may only be issued by "a local criminal court" (New York Criminal Procedure Law § 690.05 [1]), i.e., by a judge, justice or magistrate of a court of criminal jurisdiction.

If the judicial officer fails in this duty, it is he who has erred, not the policeman. This omission should not thereafter preclude the state from rehabilitating the affidavit by showing that the police actually had probable cause when they applied for the warrant. See opinion of Mr. Justice Clark, dissenting in *Aguilar* v. *Texas*, 378 U.S. 108, 118 (1964).

The idea of going behind the affidavit in search warrant cases is not a novel one. On the contrary, this kind of investigation is permitted in cases where the defendant claims that there was perjury or misrepresentation in the affidavit. *United States* v. *Carmichael*, 489 F. 2d 983 (7th Cir. 1973) (en banc); *United States* v. *Dunning*, 425 F. 2d 836 (2nd Cir. 1969); *United States* v. *Marihart*, 492 F. 2d 897 (8th Cir. 1974).** As the New York Court of Appeals

* Rule 41(c) of the Federal Rules of Criminal Procedure contemplates that Federal magistrates will go beyond the affidavit where necessary insofar as it provides:

> "Before ruling on a request for a warrant the federal magistrate or state judge may require the affiant to appear personally and may examine under oath the affiant and any witnesses he may produce, provided that such proceeding shall be taken down by a court reporter or recording equipment and made part of the affidavit."

See Burnett, "Evaluation of Affidavits and Issuance of Search Warrants: A Practical Guide For Federal Magistrates," 64 J. Crim. L. 270 (1973).

Section 690.40 of the New York Criminal Procedure Law contains a similar provision.

** Significantly, the Eighth Circuit, which in the instant case refused to take into account the State court's finding that the police *in fact* had probable cause, held in the *Marihart* case that an in-

(footnote continued on following page)

pointed out in adopting a rule permitting such attack:

> "Modern thought which produced the decision in *Mapp* v. *Ohio,* (367 U.S. 643) would make incongruous any holding that a search warrant is beyond attack even on proof that the allegations on which it was based were perjured."

People v. *Alfinito,* 16 N Y 2d 181, 185, 211 N.E. 2d 644 (1965). See also *People* v. *Cameron,* 40 A D 2d 1034, 339 N.Y.S. 2d 12 (2d Dept. 1972). We believe it is no less incongruous to bar the prosecution from showing that there was probable cause for the issuance of the warrant.

The only difference between the perjury cases and the instant cases lies in who is likely to benefit if the circumstances underlying the affidavit are examined. In the perjury cases the defendant alone stands to gain and, when he does, the State necessarily loses. To the extent that the deterrence rationale of the exclusionary rule is valid, this result is justifiable. In a case like the instant one, where rehabilitation is permitted, it is the State which may benefit. If it does, the detriment to the defendant is, at worst, the denial of a windfall. This result is equally consistent with the deterrence rationale.

We know of no constitutional impediment to conferring this potential benefit on the State so long as the means by which it is done are fair. This is simply a matter of proof, just as it is in the perjury cases, or in any case involving a probable cause determination. See, e.g., *Draper* v. *United States,* 358 U.S. 307 (1959); *Brinegar* v. *United States,* 338 U.S. 160 (1949).

(footnote continued from preceding page)

nocent misrepresentation in the affidavit "even if material" would not require suppression of the evidence seized. 492 F. 2d at 900, n. 4. Ironically, the Court relied, *inter alia* on the inapplicability of the deterrence purpose of the exclusionary rule.

The limitation on the applicability of the exclusionary rule which we propose would not adversely affect the viability of the warrant requirement, as this Court appears to have assumed in *Whiteley* v. *Warden,* 401 U.S. 560, 565, n. 8 (1971). Indeed, the notion that the warrant requirement would become "meaningless" if the affidavit is subject to rehabilitation is another instance of the unwillingness, in practice, to credit the judgment of the magistrate to whom the application is made. If the magistrate properly performs his function there will be no need to rehabilitate the affidavit. On the other hand, if he is remiss and the police in fact had probable cause, then it would be exalting form over substance to exclude otherwise reliable evidence to prevent the possible dilution of the warrant requirement.

Short of abolishing the exclusionary rule or limiting the availability of habeas corpus relief in Fourth Amendment cases (See *Schneckloth* v. *Bustamonte,* 412 U.S. 218, 250-275 [1973] [Powell, J., concurring]), affording an opportunity to rehabilitate the warrant represents a most realistic accommodation of the various interests involved in the search warrant context, as the circumstances of this case illustrate. In the instant case, the trial judge allowed the police to testify at the pre-trial supression hearing as to facts within their knowledge at the time they sought the warrant but which were not incorporated in their affidavit. After hearing all the testimony the Court determined that the police had probable cause to obtain a warrant. On appeal, the Nebraska Supreme Court reviewed the entire record and held that the affidavit was sufficient on its face but that, in any event, the additional information elicited at the suppression hearing showed the existence of probable cause. *State* v. *Rice,* 188 Neb. 728, 199 N.W. 2d 480 (1972). The Court also expressly found that the police officers in this case, who were working under pressure generated by public outrage as well as by the fear of further bombings

"were doing their very best in good faith to follow the mandate of the Fourth Amendment." Id. at 488.

The findings based upon the additional evidence were not reviewed, let alone questioned by the Federal Courts which invalidated petitioner's conviction. Nor did the Courts below question the good faith efforts of the police.*

In these circumstances, rehabilitation of the affidavit has shown that the deterrence purpose of the exclusionary rule would plainly not be served by its application to exclude the dynamite and other bomb-making paraphernalia seized from petitioner's house. As this Court rightly stated in *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974):

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force."

At the same time, rehabilitation of the affidavit has served the "judicial integrity" rationale for the rule since

---

* The District Court refused to consider the entire state court record on the ground that "the propriety of [the Magistrate's] action should be determined from what he knew, not from what someone else knew. . . ." *Rice* v. *Wolff, Jr.,* F.Supp. (D. Neb. 1974) (Petition for Certiorari, p. 61). However, this is the standard an appellate court might adopt acting in a supervisory capacity over its magistrates. It has no place on the context of federal habeas corpus review of state criminal convictions. The function of habeas corpus is not to permit federal review of specific findings made by the state courts in criminal cases, but to determine whether the conviction is fundamentally fair. This function is satisfied in a search warrant case if there was in fact probable cause to issue a warrant.

the courts have not been a party to any illegality but, rather, have been the instruments for insuring that there is no illegality. *Elkins* v. *United States,* 364 U.S. 206, 222 (1960). In addition, since there is no "contention that the search rendered the evidence unreliable or that its means cast doubt upon the [petitioner's] guilt" (*Schneckloth* v. *Bustamonte, supra,* at 258 [*Powell,* J. concurring]), rehabilitation has served society's interest in convicting the guilty by permitting introduction of the seized evidence. We believe that this interest outweighs any abstract injury to the defendant.

Finally, because it avoids the need for courts to sanction illegality at the expense of breeding public contempt for the law and also permits use of the evidence to convict the guilty, rehabilitation will foster public confidence in the law to the satisfaction of both those who favor the exclusionary rule and those who oppose it. The question of public confidence in the law is relevant in all cases but has particular significance in a case like the instant one which involved a vicious crime and which provoked great notoriety and public concern that the persons who committed it be apprehended and punished.

For the foregoing reasons we believe that a rule affording the prosecution an opportunity that it otherwise does not have to cure an error which is often insubstantial (See *United States ex rel. Rogers* v. *Warden,* 381 F. 2d 209, 219-220 [2d Cir. 1967]) and for which it is not responsible is a fair and reasonable means for avoiding the inequitable consequences which ensue from an irrelevant application of the exclusionary rule. As Justice Cardozo observed in *Snyder* v. *Massachusetts,* 291 U.S. 97, 122 (1934):

> "justice though due to the accused, is due to the accuser also. The concept of fairness must not be strained till it is narrowed to a filament."

We, therefore, strongly urge this Court to adopt a rule permitting rehabilitation in search warrant cases.

CONCLUSION

The exclusionary rule should be held inapplicable in search warrant cases where the prosecution can show that the police in fact had probable cause to obtain a warrant.

Dated: New York, New York, August 7, 1965.

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Amicus Curiae

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

LILLIAN Z. COHEN
Assistant Attorney General
of Counsel

Supreme Court, U. S.
FILED
AUG 11 1975
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and
Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of the State of Arizona as Amicus Curiae in Support of Petitioner

BRUCE E. BABBITT
Attorney General of Arizona

WILLIAM J. SCHAFER, III
Chief Counsel, Criminal Division

SHIRLEY H. FRONDORF
Assistant Attorney General

FRANK T. GALATI
Assistant Attorney General

159 State Capitol Building
Phoenix, Arizona 85007
Telephone Number (602) 271-4686

Attorneys for Amicus Curiae
State of Arizona

TABLE OF CONTENTS

	Page
Interest of Amicus Curiae	1
Summary of Arguments	3
Arguments	
I. Inferior state and federal courts have lost sight of the bases of this Court's holding in *Mapp v. Ohio*, 367 U.S. 643 (1961). Neither *Mapp* nor its progeny have ever required a rigid and unthinking application of the exclusionary rule. By their indiscriminate application of the exclusionary rule, the inferior courts have come full circle and are presently serving neither to deter police misconduct nor to preserve the imperative of judicial integrity. The case of Robert Tate Kasold amply demonstrates this complete convolution of both the intent and underlying rationale of *Mapp*	5
II. A state prisoner, who has been afforded a fair opportunity in the state courts to raise and have adjudicated his Fourth Amendment claims, should not be allowed to raise those same claims in collateral proceedings in the federal courts. All too often collateral review devolves into nothing more than a substitution of a single district judge's opinion for that of the entire state judiciary system. The case of Robert Tate Kasold amply demonstrates why *Kaufman v. United States*, 394 U.S. 217 (1969) should be overruled	19
Conclusion	24

CONTENTS OF APPENDICES

Appendix A.
Opinion of Supreme Court of Arizona;
State v. Kasold, No. 2818 ..... App. p. 1

Appendix B.
Opinion of Supreme Court of Arizona;
State v. Kasold, No. 2819 11

Appendix C.
Order of United States District Court
for the District of Arizona;
Kasold v. Cardwell, No. CIV 74-541
PHX-CAM 18

TABLE OF CASES AND AUTHORITIES

Page

Cases

Alderman v. United States
394 U.S. 165 (1969) 6

Almeida-Sanchez v. United States
413 U.S. 266 (1973) 8

Brown v. Illinois
43 L.W. 4937 (1975) 6

Elkins v. United States
364 U.S. 206 (1960) 5, 15

Fay v. Noia
372 U.S. 391 (1963) 22, 23

Harris v. New York
401 U.S. 222 (1971) 14, 23

Kasold v. Cardwell
Court of Appeals No. 75-2329 2

Page

Katz v. United States
389 U.S. 347 (1967) 22

Kaufman v. United States
394 U.S. 217 (1969) 3, 4, 19, 20, 23, 24, 25

Linkletter v. Walker
381 U.S. 618 (1965) 6

Lee v. Florida
392 U.S. 378 (1968) 6, 15

Mapp v. Ohio
367 U.S. 643 (1961) ..... in passim

McNabb v. United States
318 U.S. 332 (1943) 15

Michigan v. Tucker
417 U.S. 433 (1974) 6, 8, 13, 17, 23

Olmstead v. United States
277 U.S. 438 (1927) 14, 15

Prince v. Massachusetts
321 U.S. 158 (1944) 16

Rice v. Wolff
513 F.2d 1280
(8th Cir. 1975) 14

Schneckloth v. Bustamonte
412 U.S. 218 (1973) 3, 19, 20, 23, 24

Stanley v. Illinois
405 U.S. 645 (1972) 16

State v. Endreson
109 Ariz. 117
506 P.2d 248 (1973) 22

State v. Kasold
110 Ariz. 558
521 P.2d 990 (1974) 9, 11, 12, 16

Page

State v. Kasold
110 Ariz. 563
521 P.2d 995 (1974) 9, 12

Terry v. Ohio
392 U.S. 1 (1967) 6, 8, 15, 16, 17

Townsend v. Sain
372 U.S. 293 (1963) 21, 22, 23

United States v. Acosta
501 F.2d 1330
(5th Cir. 1974) 14

United States v. Calandra
414 U.S. 338 (1974) 6, 7, 13, 17, 23

United States v. Peltier
43 L.W. 4918 (1975) 6, 8, 9, 13
17, 18, 23

Rules and Statutes

Ariz.Rev.Stat.Ann. § 13-653 11

Federal Rules of Civil Procedure
Rule 52(a).....22

Rules of the Supreme Court of the United States
Rule 42(4).....1

28 U.S.C. § 2254 .....12, 20, 23, 24

Articles and Textbooks

Barrett, *Exclusion of Evidence Obtained by Illegal Searches,*
43 Calif.L.Rev. 565 (1955) 16

Burger, *Who Will Watch the Watchmen?,*
4 Am.U.L.Rev. 1 (1964) 17

Fleming, *The Price of Perfect Justice*
(1974) 23

Page

Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement,*
59 Minn.L.Rev.251 (1974) 14, 16

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and
Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

Brief of the State of Arizona as Amicus Curiae in Support of Petitioner

Interest of Amicus Curiae

The State of Arizona files this amicus brief pursuant to Rule 42(4) of the Rules of the Supreme Court of the United States. Of the several questions presented for review by petitioner, two vitally and immediately interest the State of Arizona. Amicus, in attempting to aid this Honorable Court in its resolution of these two questions, seeks a result which (1) would limit the applicability of the exclusionary rule to situations where a Fourth Amendment violation is committed by law enforcement officers who had knowledge, or may properly be charged with knowledge, that the search was unconstitutional; and (2) would limit the inquiry of federal

district courts on habeas corpus review of a state prisoner's Fourth Amendment claims to the question of whether the defendant was provided a fair opportunity in the state courts to raise and have adjudicated the Fourth Amendment claim.

The State of Arizona's vital interest in proper resolution of these two constitutional problems is to help this Honorable Court strike a proper balance between protecting the Fourth Amendment rights of all citizens, and protecting society from the ever-increasing havoc wrought by the lawless among us.

Amicus' immediate interest in a proper resolution of these two constitutional problems is to have this Honorable Court's decision herein mandate a reversal by the United States Court of Appeals for the Ninth Circuit of an order by the United States District Court for the District of Arizona granting the petition for a writ of habeas corpus of Arizona state prisoner Robert Tate Kasold, a convicted rapist and child molester. Acting on behalf of Warden Harold J. Cardwell, the State of Arizona has appealed the district court's order to the United States Court of Appeals. Among the issues being raised in *Kasold v. Cardwell*, Court of Appeals No. 75-2329, are the two exclusionary rule questions being considered in *Wolff v. Rice*.

The brief of amicus will not attempt to present to this Honorable Court the legal arguments which have been made by petitioner. Amicus will instead endeavor to demonstrate to this Honorable Court the injustices suffered by society as a result of the indiscriminate application of the exclusionary rule and the unlimited review of Fourth Amendment claims by federal district courts. Thus, amicus presents the case of Robert Tate Kasold.

Summary of Arguments

I

Dissatisfaction with the present-day applications of the exclusionary rule is misdirected at this Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961). It is the courts inferior to this who have ignored the basic principles of *Mapp* and who have ignored this Court's discussions of the purposes of the exclusionary rule. The case of *Kasold v. Cardwell* provides a graphic example of how *Mapp* has been stood on its head: the federal district court invoked the exclusionary rule on collateral review despite explicitly finding that there existed *no evidence of police misconduct*. This complete convolution of the *Mapp* holding must be corrected. Amicus urges that this Court hold that the exclusionary rule should be invoked only if the police had knowledge, or could properly be charged with knowledge, that they were conducting a search in violation of the Fourth and Fourteenth Amendments.

II

For the reasons set forth in the concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973), this Honorable Court should overrule its decision in *Kaufman v. United States*, 394 U.S. 217 (1969). The case of Robert Tate Kasold brings sharply into focus how the federal district courts have come to dominate certain aspects of state criminal proceedings, and how federal habeas corpus often devolves into nothing more than a mere substitution of the personal viewpoint of a solitary district judge for that of an entire state judicial system's legal conclusions.

Also, the invocation of the exclusionary rule in a

collateral federal proceeding cannot possibly deter police misconduct. Furthermore, determinations of when the imperative of judicial integrity is violated in the state courts are not within the purview of the federal courts. Therefore, *Kaufman* is no longer viable.

ARGUMENT

I

Inferior State and Federal Courts Have Lost Sight of the Bases of This Court's Holding in *Mapp v. Ohio*, 367 U.S. 643 (1961). Neither *Mapp* Nor Its Progeny Have Ever Required a Rigid and Unthinking Application of the Exclusionary Rule. By Their Indiscriminate Application of the Exclusionary Rule, the Inferior Courts Have Come Full Circle and Are Presently Serving Neither to Deter Police Misconduct Nor to Preserve the Imperative of Judicial Integrity. The Case of Robert Tate Kasold Amply Demonstrates This Complete Convolution of Both the Intent and Underlying Rationale of *Mapp*.

Dissatisfaction with the present application of the exclusionary rule is rampant, and this Honorable Court's decision in *Mapp v. Ohio*, 367 U.S. 643 (1961) is the primary focus of the wrath vented by police, prosecutors, press and public alike. But is *Mapp v. Ohio* the real culprit? Or, have those courts who are charged with applying this Court's decisions completely lost sight of *Mapp's* holding? Amicus believes it is the latter and invites this Court to use *Wolff v. Rice* as a vehicle to instruct the state and federal courts that they have not heeded much of what this Court has said of the exclusionary rule.

A brief examination of *Mapp* and certain of its progeny is in order. The *Mapp* Court — citing *Elkins v. United States*, 364 U.S. 206, 217, 222 (1960) — offered two basic rationale in "holding that the exclusionary rule is an essential part of both the Fourth and Fourteenth Amendments": deterrence of police misconduct, and

"the imperative of judicial integrity." *Mapp v. Ohio*, 367 U.S. at 656-659.[1] Amicus submits that the *Mapp* majority would not have grounded its decision upon these two specifically enumerated reasons if it had not intended the exclusionary rule to be applied only in furtherance of the rule's aims. Indeed, *Mapp* seems to indicate as much: the Court stated that while "[i]n some cases" a criminal would go free, "the class of state convictions possibly affected by this decision is of relatively narrow compass * * *." 367 U.S. at 659. That relatively narrow compass of cases affected by *Mapp* never came to pass; the criminal justice system instead finds itself in a self-imposed straight jacket. Amicus suggests that this result has obtained because the courts have lost sight of *Mapp's* underpinnings and have ignored this Court's carefully delineated dissertations on the exclusionary rule.

While it is true that neither *United States v. Calandra*, 414 U.S. 338 (1974), nor *Michigan v. Tucker*, 417 U.S. 433 (1974), nor *United States v. Peltier*, 43 L.W. 4918 (1975) undertake a full scale reexamination of the present application of *Mapp v. Ohio*, in each case this Honorable Court was presented with a claim by the respective criminal defendants that the imposition of the exclusionary rule was warranted in their cases. In deciding each case, the Court undertook an examination of each claim in light of the purposes of the rule.

---

[1] A long line of this Court's decisions have reaffirmed one or both of these two rationale. *E.g. Linkletter v. Walker*, 381 U.S. 618 (1965); *Terry v. Ohio*, 392 U.S. 1 (1967); *Lee v. Florida*, 392 U.S. 378 (1968); *Alderman v. United States*, 394 U.S. 165 (1969); *United States v. Calandra*, 414 U.S. 338 (1974); *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Peltier*, 43 L.W. 4918 (1975); *Brown v. Illinois*, 43 L.W. 4937 (1975).

In *Calandra*, the Court held that:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> '[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late.' Linkletter v. Walker, 381 U.S. 618, 637 (1965).
>
> Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:
>
> 'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217 (1960).
>
> In sum, the rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." 414 U.S. at 347-348.

The Court ultimately decided that application of the rule to grand jury proceedings "would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct * * *." 414 U.S. at 351-352.

In a Fifth Amendment context, the *Tucker* Court was called upon to decide, *inter alia*, whether the police's pre-Miranda failure to advise Tucker of his right to appointed counsel justified application of the exclusionary rule. The Court stated that:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instil in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

Finding good faith conduct on the part of the police, the Court held that the exclusionary rule was not applicable in *Michigan v. Tucker*.

Most recently, in *United States v. Peltier*, supra, this Court was urged to hold that its decision in *Almeida-Sanchez v. United States*, 413 U.S. 266 (1973) was to be applied retroactively. In considering the problem, the decision cites the above-quoted portions of *Calandra* and *Tucker*, and concludes:

> "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment. Admittedly this uniform treatment of roving border patrol searches by the federal judiciary was overturned by this Court's decision in *Almeida-Sanchez*. But in light of this history and of what we perceive to be the purpose of the exclusionary rule, we conclude that

nothing in the Fourth Amendment, or in the exclusionary rule fashioned to implement it, requires that the evidence here be suppressed, even if we assume that respondent's Fourth Amendment rights were violated by the search of his car." 43 L.W. at 4922.

Amicus has discussed the dual rationale of *Mapp* and has set out these lengthy quotes from *Calandra, Tucker* and *Peltier* solely to demonstrate that the Supreme Court of the United States has never advocated a *per se* application of the exclusionary rule. See *Terry v. Ohio*, 392 U.S. 1 (1967). It is abundantly clear that before any court invokes the exclusionary rule, it must determine whether or not the rule's purpose will be served. Yet, an examination of how the exclusionary rule is now being applied by American courts clearly indicates that these courts have completely lost sight of the purpose of the rule. The case of Robert Tate Kasold presents such an example. [For a complete rendition of the *Kasold* case, see the opinions of the Supreme Court of Arizona, reported as *State v. Kasold*, 110 Ariz. 558, 521 P.2d 990 (1974) and 110 Ariz. 563, 521 P.2d 995 (1974), attached to this brief as Appendices A and B.]

School authorities at North High School, Phoenix, Arizona initiated the police investigation of Kasold. They had received reports that Kasold, a teacher at the school, was involved in sexual activity with female students, the exact extent of which was unknown. They also reported that Kasold had been previously referred by the school district for psychological counseling because of complaints of over-familiarity with students.

A Phoenix police officer interviewed the two students, both of whom were under 18 years of age. The girls told

of acts of intercourse as well as fellatio and other lewd acts made at Kasold's suggestion. They related that Kasold took many photographs of these activities by means of a timing device; and that he was fond of these photographs and kept them to look at for his own sexual stimulation. One student told the officer that it was highly unlikely petitioner would destroy the photographs, because of his habits of masturbating while viewing them.

The two girls' information was promptly verified by polygraph examination. At this point, the police applied for a search warrant for Kasold's apartment, giving sworn oral testimony before the magistrate as well as summarizing the investigation in the affidavit for the search warrant.

The acts of Kasold with the two girls took place during a three-month period ending in July, 1972. Their disclosure to school authorities was made in late December, 1972, approximately five months later. The police investigation was completed in a few days, culminating in the appearance before the magistrate on January 2, 1973. During this five-month period Kasold had moved from the trailer where the sexual acts took place to a Phoenix apartment. All of the time factors were revealed to the magistrate.

As a result of the search warrant, police officers seized a large number of explicit sexual photographs of Kasold, the two girls, and others, pornographic books and questionnaires given to students by Kasold, and a roll of undeveloped film. The roll of film was developed and contained photographs of Kasold and a small child, later identified as the seven-year-old retarded daughter of a neighbor. Kasold was sexually exposed in the film,

and was engaging in acts within the scope of child molestation. Ariz. Rev. Stat. Ann. § 13-653.

The fruits of the search warrant were not introduced at the trial of petitioner for second degree rape. The state did, however, introduce the material in a lengthy mitigation/aggravation hearing.

The roll of film was the basis for Kasold's conviction for child molestation, in a second prosecution. The retarded seven-year-old victim was for all practical purposes mute and unable to testify at trial. The photographs with some foundational material were the sole evidence introduced by the state in this case. The Supreme Court of Arizona described the photographs:

> "The photographs show the defendant and the neighbor girl in various poses, one in which the little girl is watching cartoons on TV while the defendant is kneeling behind her fondling his private parts. There are three photographs of the little girl seated on the floor in the defendant's living room while the defendant stands over her and appears to be masturbating. Three photographs have them seated next to each other on the couch with the defendant's private parts exposed through his open fly. During all of this time the defendant was dressed in a pair of cutoff shorts. Two photographs show the defendant seated on the floor near the couch with his private parts exposed and the defendant appears to be rubbing the private parts of the little girl, although the little girl is dressed and the defendant has his hand on her shorts. Three other photographs show the little girl standing on her head with her legs spread apart and the defendant standing above her with his penis pointed to, but not

> touching, her private parts or clothing. The last photograph in the evidence shows the defendant with his pants around his knees, his private parts exposed, and the little girl doing a headstand in front, facing backwards, and he is holding her legs spread apart. In all of the photographs the victim is clothed." *State v. Kasold,* 110 Ariz. 558, 559, 521 P.2d 990, 991 (1974).

Kasold was convicted of six counts of second degree rape and one count of child molestation. He was sentenced to fifteen years to life for each count of rape, to be served concurrently, and twenty years to life for the child molestation. He is at present incarcerated in the Arizona State Prison. The Arizona Supreme Court affirmed the convictions. *State v. Kasold,* 110 Ariz. 558, 521 P. 2d 990 (1974); *State v. Kasold,* 110 Ariz. 563, 521 P.2d 995 (1974); Appendices A and B.

Following the affirmance of his convictions, Kasold petitioned the United States District Court for the District of Arizona for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. An evidentiary hearing was held on April 7, 1975.

In its order of April 29, 1975, the district court granted the writ of habeas corpus, vacating the conviction for child molestation and ordering Kasold to be resentenced on the statutory rape convictions. The court found, contrary to the previous determination of the Arizona Supreme Court, that the magistrate did not have facts to determine that the photographs still existed and were in Kasold's possession, that a reasonable person would not believe that the photographs went with Kasold to his new apartment, and that the affidavit did not support a finding that a continuous course of conduct between

Kasold and his students could still exist (Order of April 29, 1975, at 9; see Appendix C).

The anomalous result obtained in the case of Robert Tate Kasold could be more easily digested if one could point to the district court's order setting aside Kasold's conviction and see that the legitimate and important concern for deterring police misconduct were being served. However, the district court did not offer that salve to the seven-year-old retarded victim nor to the citizens of Arizona. Instead, the court invoked the exclusionary rule despite finding the police blameless:

> "The parties have agreed that the police did not sit on the information once received. The police acted with dispatch in securing a warrant when they were given the information. *Thus, there is no allegation or evidence of police misconduct.*" (Order of April 29, at 6, see Appendix C.) (Emphasis added.)

Again, an examination of the district court's decision in *Kasold* reveals no discussion of the possible application of the exclusionary rule in light of its deterrent purpose. *Kasold* presents yet another example of a court being cognizant only of *Mapp's* holding that the exclusionary rule is applicable to the states, but totally ignoring the reasons this Court held the exclusionary rule constitutionally required. The district court's order in *Kasold* further indicates an abject ignorance of this Court's discussions of the exclusionary rule in *Calandra* and *Tucker*. (*Peltier* was not decided until two months after the *Kasold* decision.)

Amicus refers the Court to two recent examples of United States Courts of Appeals ignoring *Mapp's* rationale and exhibiting a gross ignorance of the *Calandra, Tucker* and *Peltier* holdings. These two cases are

United States v. Acosta, 501 F.2d 1330 (5th Cir. 1974), decision after rehearing en banc, 509 F.2d 539 (5th Cir. 1975), and the instant case below, *Rice v. Wolff*, 513 F.2d 1280 (8th Cir. 1975).

In *Acosta*, the majority summarily rejected the dissenting opinion of Circuit Judge Gee, who advocated applying the exclusionary rule only when the objective of deterring police misconduct would be served. And in the instant case, the Eighth Circuit declined to apply *Tucker's* pertinent statements concerning the exclusionary rule. In refusing to act, both courts stated that they were unable to do so because *Mapp* had not been overruled. While it is true that *Mapp* has not been overruled, each court completely ignored the fact that *Mapp* is grounded upon the theory that the exclusionary rule is required to deter the unlawful invasion of Fourth Amendment rights by the police. It is submitted, therefore, that the positions of Judge Gee in *Acosta* and of amici in *Rice v. Wolff* do not require any reversal of *Mapp*, but are instead implicit within its holding. *Cf. Harris v. New York*, 401 U.S. 222, 225 (1971).

Turning once again to the *Kasold* decision, it is not only an example of a court failing to discuss exclusion in light of the rule's deterrent purpose, it also fails to consider the secondary theory of judicial integrity. Assuming that the principles of judicial integrity still function as underpinning for the exclusionary rule,[2] it is important to trace the development of that principle.

In *Olmstead v. United States*, 277 U.S. 438 (1928), the government's wiretap was clearly in violation of the

---

[2]Schrock and Welsh, *Up From Calandra: The Exclusionary Rule as a Constitutional Requirement*, 59 Minn.L.Rev. 251, 272, 277 (1974) (hereinafter cited as Schrock).

relevant state statute. According to the famous dissent of Mr. Justice Brandeis, by accepting the fruits of an avowedly criminal act, the court ratified the act and thereby assumed moral responsibility for that crime. The court would not condone such action on the part of a civil litigant, and should not condone such illegality on the part of the government agents. By accepting its fruits, the judicial process is contaminated; respect for the law is undermined, and the people cannot have confidence in the administration of justice. *Olmstead v. United States*, supra, 277 U.S. at 483-484. (Brandeis, J., dissenting.)

Amicus submits that the pure and idealistic rationale of judicial integrity as set forth in *Olmstead, Elkins v. United States*, 364 U.S. 206 (1960); *McNabb v. United States*, 318 U.S. 332 (1943); *Terry v. Ohio*, supra; and *Mapp v. Ohio*, supra; has led to the bankruptcy of this ideal when the exclusionary rule is indiscriminately applied in instances in which police officers did not act with disregard for constitutional rights. The ultimate, and absurd, result is apparent in the case of Robert Tate Kasold. There the United States District Court explicitly found no police illegality, and instead commended those officers for the level of their investigation. Hence the court was never asked to become an "accomplice in wilful disobedience of law," *McNabb v. United States*, supra, 318 U.S. at 385; *Lee v. Florida*, 392 U.S. at 386.

Amicus submits that before the "unclean hands" doctrine should be activated, there should be present at least a modicum of police misconduct, of harrassment, or of reckless disobedience to the laws of the United States and to the charter upon which this country was founded, *Mapp v. Ohio*, 367 U.S. at 659. Absent the taint of "illegality", amicus submits that the rigid and monolithic application of the exclusionary rule is unnecessary,

based upon this rationale. Restrained police conduct within legitimate investigative guidelines does not require the radical operation of exclusion. *Cf.* the street encounter in *Terry v. Ohio*, 392 U.S. at 15.

Amicus further submits that the judicial integrity rationale in those instances in which little or no deterrent effect can be expected, is, in fact, sullied when the cost is the abandonment of those whom the court has an obligation to protect.[3] As an example, in the case now before this Honorable Court, the cost is the abandonment of police officers to what can only be described as assassination. In the case of Robert Tate Kasold, of immediate interest to amicus, in its quest for judicial integrity the court abandoned immature children such as the retarded, seven-year-old victim who could *never* fulfill the obligation imposed upon her by the district court — to have adequately described the crime committed against her as soon as it had happened. See *State v. Kasold*, 110 Ariz. at 561-562, 521 P.2d at 993-994. This Honorable Court has recognized the right, if not the duty, to protect the moral and emotional welfare of its children.[4] Surely that obligation to protect the helpless is another facet of judicial integrity that must be considered before the court may take satisfaction in its abstention in the name of "clean hands". In the words of

---

[3]Schrock suggests that the courts, in following the rationale may be taking satisfaction in their own purity in the midst of "squalid and frightening crime"; [that the social judgment that the policeman's conduct is more reprehensible than that of the defendant in a particularly offensive crime may not be the ultimate social judgment, see Schrock, supra, note 2, at 265-267]. Barrett, *Exclusion of Evidence Obtained by Illegal Searches*, 43 Calif.L.Rev. 565, 582 (1955).

[4]*Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944); *Stanley v. Illinois*, 405 U.S. 645, 650-652 (1972).

Chief Justice Burger:

> ". . . we may have come full circle from the place where Brandeis stood, and that a vast number of people are losing respect for law and the administration of justice because they think that the Suppression Doctrine is *defeating* justice."[5]

Amicus submits that with decisions such as *Kasold*, the convolution of the principles expressed in *Mapp v. Ohio* is complete: the exclusionary rule is now being applied in cases when a court expressly finds the absence of police misconduct, and the rule's mere application itself tends to lessen the integrity of every court in the land. *Mapp* has been stood on its head and the prophesy of *Terry v. Ohio* has come true: "a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime". 392 U.S. at 15.

Amicus submits that in order to rectify situations such as those exemplified by *Kasold*, this Court need not take the drastic step of overruling *Mapp v. Ohio*. Instead, the Court need only to make clear to all inferior courts in this land that its discussions of the exclusionary rule in *Calandra, Tucker* and *Peltier, inter alia*, are in complete harmony with the original intent of *Mapp* and that the exclusionary rule should be applied only when such application will (1) deter future police misconduct, or (2) safeguard the imperative of judicial integrity. Rigid and unthinking application of the rule must be condemned in strong, unequivocal language.

---

[5]Burger, *Who Will Watch the Watchman?*, 14 Am.U.L.Rev. 1, 22 (1964).

Lastly, amicus suggests that in order to clearly apprise every American court of its duty when reviewing Fourth Amendment search and seizure claims, this Honorable Court should unequivocally commit itself to the standard adopted in *United States v. Peltier:* "If the purpose of the exclusionary rule is to deter unlawful police conduct, then evidence obtained from a search should be suppressed only if it can be said that the law enforcement officer had knowledge, or may properly be charged with knowledge, that the search was unconstitutional under the Fourth Amendment." 43 L.W. at 4922.

Amicus submits that the *Peltier* standard realistically returns search and seizure law to a position where the legitimate interests of society and the rights of all citizens to be free from unreasonable search and seizure can each be properly protected.

ARGUMENT

II

A State Prisoner, Who Has Been Afforded a Fair Opportunity in the State Courts to Raise and Have Adjudicated His Fourth Amendment Claims, Should Not Be Allowed to Raise Those Same Claims in Collateral Proceedings in the Federal Courts. All Too Often Collateral Review Devolves Into Nothing More Than a Substitution of a Single District Judge's Opinion For That of the Entire State Judiciary System. The Case of Robert Tate Kasold Amply Demonstrates Why *Kaufman v. United States*, 394 U.S. 217 (1969) Should Be Overruled.

Although amicus chooses not to reargue the position ably advanced by petitioner Wolff, the State of Arizona urges that this Honorable Court adopt in its entirety the "detailed and persuasive" concurring opinion of Mr. Justice Powell in *Schneckloth v. Bustamonte*, 412 U.S. 218, 250 (1973). In so doing, this Court must of necessity overrule or limit some of its earlier precedents, especially the dicta of *Kaufman v. United States*, 394 U.S. 217, 225-226 (1969).

A close examination of the opinions of this Honorable Court suggests that *Kaufman* no longer expresses the opinion of a majority of the justices. Both the Chief Justice and Mr. Justice Rehnquist joined Mr. Justice Powell in his *Schneckloth* concurrence. Mr. Justice Blackman's separate concurrence, 412 U.S. at 249, expresses his agreement with Mr. Justice Harlan's *Kaufman* dissent, 394 U.S. at 242, and with "nearly all" of Mr. Justice Powell's *Schneckloth* opinion. Finally, even though Mr. Justice Stewart authored the majority

opinion in *Schneckloth*, he had previously joined in the aforementioned *Kaufman* dissent of Mr. Justice Harlan. A simple exercise in counting reveals that five sitting justices of this Honorable Court are on record as favoring the limitation or overruling of *Kaufman's* statement that state prisoners' may assert Fourth Amendment claims in seeking federal habeas corpus relief pursuant to 28 U.S.C. § 2254.

Amicus submits that for the reasons expressed by Mr. Justice Powell in *Schneckloth*, Fourth Amendment claims of state prisoners should not be held cognizable under the federal habeas corpus statutes, and amicus further submits that *Wolff v. Rice* is the proper vehicle for this Court's anti-*Kaufman* majority to put a stop to the mere substitution by a district judge of his opinion for that of the full bench of state supreme courts in search and seizure cases. The case of Robert Tate Kasold illustrates the problem.

In early January of 1973, a detective of the Phoenix, Arizona, Police Department presented an affidavit to a Maricopa County Justice of the Peace requesting that a search warrant be issued. (Pertinent portions of the affidavit are set out in the opinion of the Arizona Supreme Court, attached as Appendix B.) After studying the affidavit, the magistrate issued the warrant. The search of Kasold's apartment resulted in the seizure of between 500 and 600 photographs of a sexual nature, including photographs of both rape victims and the seven-year-old retarded child molestation victim.

At trial, Kasold moved for the suppression of the seized evidence, claiming that the affidavit failed to establish probable cause because the information supplied to the police was "stale". A suppression hearing

was held and after due consideration, the superior court judge denied the motion to suppress.

This same issue was presented to the Supreme Court of Arizona on appeal. The issue was fully briefed and argued before that court by counsel. The Arizona Court upheld the search, finding that the evidence sought — explicit sexual photographs which Kasold viewed for the purpose of sexual gratification — was not the type which would likely be thrown away or consumed in five months. The court distinguished this type evidence from consumables, clearly taking into consideration the unique nature of Kasold's crime. There is no other reported case similar to this one — it is unique on its facts. This is not a case of consumable or disposable items, almost certain to be disposed of during this time period (i.e., alcohol, drugs, stolen property, gems). Kasold took photographs of himself and his victims by a delayed photographic technique. Why would anyone take such photographs? Given Kasold's propensities, common sense provides us with only one reason: to keep for sexual pleasure. The very purpose of a photograph is to keep, to memorialize an event. Photographs are simply not made to be destroyed, especially photos of this personal an ilk.

After the affidavit was fully and fairly tested by three separate levels of the Arizona court system (Justice Court, Superior Court and Supreme Court), Kasold raised the issue anew in a federal habeas proceeding. On this fourth review of the affidavit, he found a sympathetic ear. After conducting an evidentiary hearing, see *Townsend v. Sain*, 372 U.S. 293 (1963), the United States District Court for the District of Arizona ordered that Kasold's child molestation conviction be vacated. The federal district judge based his decision upon his

finding that the information contained in the affidavit was "stale". See Appendix C. In so ruling, the district court chose not to address the Arizona Supreme Court's finding that the unique nature of the photographs made it unlikely that the evidence would be outside of Kasold's possession. Furthermore, the district court chose to ignore the fact that the Fourth Amendment's protection is afforded to people, not places. *Katz v. United States*, 389 U.S. 347 (1967).

Amicus is not attempting to argue the merits of the *Kasold* case to this Honorable Court, although such an argument may be made in the future. Rather, amicus is attempting to demonstrate that on an extremely close question of law, and in a case where there exists no adequate legal precedents to guide the courts on the precise question presented, the United States District Court becomes, in effect, a court of both first and last resort. This is so for the following reasons.

Under Arizona law, a reviewing court will sustain a judicial determination of probable cause so long as there existed a "substantial basis" for that conclusion. *State v. Endreson*, 109 Ariz. 117, 506 P.2d 248 (1973). The reviewing court is not allowed to reevaluate the probable cause issue anew.

Yet, when the district court considers the existence or lack of probable cause, it is bound by no restraints of prior state court findings. *Townsend v. Sain*, supra; *Fay v. Noia*, 373 U.S. 391 (1963). Assuming that the federal district court holds contra to the decision of the state supreme court, and further assuming that the issue is indeed very, very close, the district court decision will stand, because the standard applied in federal appellate review is that of "clearly erroneous". Fed. R. Civ. P.

52(a). By definition, a district judge's decision cannot be clearly erroneous on a close legal question.

The result is clear: in a case such as Kasold's, it is the opinion of one United States District Judge which counts. Decisions of state courts are of no import; appeals in the federal system are futile. The district judge may as well be the magistrate to whom all search warrant applications are submitted because his is the ultimate decision. Such a circumstance is intolerable under our federal system; it makes a mockery of this Honorable Court's belief in "the coequal responsibilities of state and federal judges in the administration of federal constitutional law . . ." *Townsend v. Sain*, 372 U.S. at 314-315. Mr. Justice Powell's comments concerning the effect of collateral review on the state judicial system are pertinent, *Schneckloth v. Bustamonte*, 412 U.S. at 259-271 (Powell, J., concurring), particularly since those comments prove Mr. Justice Clark to be a prophet, *Fay v. Noia*, supra, 372 U.S. at 445-448 (Clark, J., dissenting). See also M. Fleming, THE PRICE OF PERFECT JUSTICE (1974), p. 22-36.

Moreover, *Kaufman* should be overruled for another basic reason. Again, it must be kept in mind that the primary purpose of the exclusionary rule is to deter police misconduct and that a secondary purpose is to protect the imperative of judicial integrity. This Court has consistently refused to apply the exclusion sanction when these purposes would not be served. *United States v. Calandra*, supra; *Michigan v. Tucker*, supra; *United States v. Peltier*, supra; *Harris v. New York*, supra. In a § 2254 proceeding, neither rationale is served by invoking the exclusionary rule.

Mr. Justice Powell has adroitly explained why the

deterrent purpose is inapplicable in a collateral proceeding:

> "Whatever the rule's merits on an initial trial and appeal * * * the case for collateral application of the rule is an anemic one. On collateral attack, the exclusionary rule retains its major liabilities while the asserted benefit of the rule dissolves. For whatever deterrent function the rule may serve when applied on trial and appeal becomes greatly attenuated when, months or years afterward, the claim surfaces for collateral review. The impermissible conduct has long since occurred, and the belated wrist slap of state police by federal courts harms no one but society on whom the convicted criminal is newly released." *Schneckloth v. Bustamonte*, 412 U.S. at 268-269 (Powell, J., concurring).

The judicial integrity rationale is even less applicable in a § 2254 proceeding, for if a state judicial system retains any province which is free from federal intervention, it is the right to determine for itself when its own integrity has been compromised. The federal courts should play no role in making such a determination.

Amicus submits that for all the foregoing reasons, and for those reasons set forth in the brief of petitioner Wolff, to the extent that *Kaufman v. United States* authorizes federal district courts to consider the Fourth Amendment claims of state prisoners brought in habeas actions, that case should be overruled.

Conclusion

Courts at all levels have lost sight of the essence of the decision in *Mapp v. Ohio* and are invoking the ex-

clusionary rule in an indiscriminate manner. This Honorable Court should take this opportunity to insure that the exclusion sanction is applied only when its purposes of deterrence of police misconduct and the safeguarding of judicial integrity will be served.

Furthermore, no legitimate purpose is served by allowing state prisoners to relitigate Fourth Amendment claims in federal habeas corpus proceedings.

Legitimate interests in harmonious federal-state relations, in the finality of state criminal convictions, and ultimately, in the continued viability of state criminal courts themselves, are not being served.

American criminal justice will be greatly improved if the current broad applicability of the exclusionary rule is reduced to conform to the original dictates of *Mapp*, and if *Kaufman* is overruled. The State of Arizona, as amicus curiae, respectfully requests that these steps be taken and that the judgment below in No. 74-1222 be reversed.

Respectfully submitted,

BRUCE E. BABBITT
Attorney General of the State of Arizona

WILLIAM J. SCHAFER III
Chief Counsel
Criminal Division

SHIRLEY H. FRONDORF
Assistant Attorney General

FRANK T. GALATI
Assistant Attorney General

APPENDIX A

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
In Division

The State of Arizona,
Appellee,
vs.
Robert Tate Kasold,
Appellant.

No. 2818

Appeal from the Superior Court of Maricopa County
Cause No. CR-74621
The Honorable Frederick W. Heineman, Judge

JUDGMENT AFFIRMED

Gary K. Nelson, The Attorney General — Phoenix
By Shirley H. Frondorf, Special Assistant Attorney General
Attorneys for Appellee

Derickson & Kemper — Phoenix
By James Hamilton Kemper
Attorneys for Appellant

CAMERON, Vice Chief Justice

This is an appeal from a jury verdict and judgment of guilt to the crime of molestation of child, § 13-653 A.R.S., and a sentence thereon of not less than twenty years nor more than life imprisonment.

We are asked to consider four questions on appeal:

1. Did the trial court commit reversible error in denying defendant's motion to suppress the fruits of a search warrant?
2. Was there improper foundation for the admission of some thirteen photographs?
3. Did the court commit error in denying the defendant's motion to hold a competency hearing on the question of the victim's ability to testify?
4. Does the evidence support the verdict and judgment?

The facts necessary for a determination of this matter on appeal are as follows. Sometime during the month of July, 1971, while the defendant's wife and family were away on vacation, the defendant took a series of photographs, with the help of a self-timer, of the defendant and a mentally retarded neighborhood girl, then eight years old. The photographs show the defendant and the neighbor girl in various poses, one in which the little girl is watching cartoons on TV while the defendant is kneeling behind her fondling his private parts. There are three photographs of the little girl seated on the floor in the defendant's living room while the defendant stands over her and appears to be masturbating. Three photographs have them seated next to each other on the couch with the defendant's private parts exposed through his open fly. During all of this time the defendant was dressed in a pair of cutoff shorts. Two photographs show the defendant seated on the floor near the couch with his private parts exposed and the defendant appears to be rubbing the private parts of the little girl, although the little girl is dressed and the defendant has his hand on her shorts. Three other photographs show the little girl

standing on her head with her legs spread apart and the defendant standing above her with his penis pointed to, but not touching, her private parts or clothing. The last photograph in the evidence shows the defendant with his pants around his knees, his private parts exposed, and the little girl doing a headstand in front, facing backwards, and he is holding her legs spread apart. In all of the photographs the victim is clothed.

This is a companion case to State v. Kasold, No. 2819, filed this day. As a result of the search warrant in the companion case, the police obtained the roll of undeveloped film. When the film was developed, the police were able to identify the victim as a neighbor girl. Motion to suppress was denied, and the pictures were admitted into evidence based upon the testimony of the victim's mother. The defendant testified on his own behalf and admitted the taking of the pictures contending:

"A Are you asking my intent in taking the photographs? What I was trying to accomplish?

"Q That is precisely what I am asking you.

"A I thought that it would be a challenge to take photographs in which I would be exposed without the knowledge of the other person present. And —

"Q When you say 'exposed' you mean sexually exposed?

"A Yes.

"Q All right, go on.

"A It was not my intention that anybody ever should see that. Certainly not Mona, at that time, on that day, and certainly not the people

who have since seen these photographs.

It became sort of a contest, I suppose. The camera was there and it was loaded.

I had no intention of nor did I harm Mona in any way either mentally or physically, but it became, I suppose, sort of a private act of exhibitionism. I never made these photographs. I never processed the film. It was never my intention that anyone else would ever see what took place that day, but, as Mr. — as the prosecutor has said, the camera did a faithful job."

The defendant contended that at all times during the taking of the pictures that the victim never saw him exposed. Defendant also denied that he ever touched the private parts of the body of the victim. For example:

"Q Would you explain that to the jury, please?

"A I don't understand.

"Q What was your purpose in putting your left hand between Mona's legs?

"A Well, I had taken by that time nine previous exposures and I had a 20-exposure roll of film. I realized I couldn't shoot anything else on that roll of film. I wasn't going to mix lighting in this, anything like this, and I guess I was running out of poses. This is to simulate some sort of sexual gesture, I suppose.

'Q In that photograph is your hand in fact touching the private parts of —

"A No. If I had touched her I would have drawn her attention.

"Q How close did you come to touching her?

"A I suppose an inch or so, maybe, two, depending on the parts of my hand, probably about like this (indicating)."

The victim was called but not allowed to testify. The jury was also instructed on the offense of contributing to the delinquency of a minor (§ 13-822 A.R.S.), but the jury returned a verdict of guilty as charged.

Search and Seizure

We have discussed the matter of the search warrant in the companion case of State v. Kasold, No. 2819, filed this day, and have held that the search warrant was a proper warrant, and the items seized thereunder were admissible. It makes no difference that the information obtained leads to a different crime than that which the officers believed to have taken place when the search warrant was obtained. State v. McMann, 3 Ariz. App. 111, 412 P.2d 286 (1966).

Admission of the Photographs

We find no error in the admission of the photographs despite the defendant's claim of lack of proper foundation. The mother was able to identify both the victim and the defendant, and the jury was able to identify the defendant from the pictures. The defendant described himself as an amateur photographer and we believe that his pictures accurately portray what he intended them to portray. We find no error.

Testimony of the Victim

The defendant, testifying in his own behalf, stated:

"Q You are telling the jury you are innocent of this charge, is that right?

"A Yes, I am.

"Q Are you telling the truth?

"A Yes, I am.

There are two people who can testify as to what happened that day, the so-called victim, Mona, and myself, the defendant.

I don't know why Mona hasn't testified. I know it is not because she is too mentally retarded, because I have talked with her many times and she is perfectly capable of expressing her thoughts and her recollections.

On the other person, I am the other person and, of course, I am the defendant. I requested a lie detector test to verify that I am telling the truth as I understand it."

At the conclusion of the defendant's case, the prosecutor indicated his desire to call Mona Whiting to the witness stand in rebuttal. Defendant's counsel objected to the girl being called into the courtroom at all, and asked that a preliminary hearing in chambers be held to determine the girl's competency to testify as a witness. The record reflects the following:

"MR. McDONALD: Yes, Your Honor, the State has rebuttal. The first witness the State would call would be Mona Whiting.

(Mona Whiting entered the courtroom and went to the Clerk's desk but would not be sworn when requested by the Clerk.)

"THE COURT: Ladies and gentlemen, we will take a short recess.

(Court was recessed at 2:55 p.m. and the following proceedings took place outside of

chambers immediately thereupon, with the Court, Mr. McDonald and Mr. Kemper present:)

"MR. KEMPER: I would like the record to reflect Mr. McDonald is here to agree or disagree with me that the girl was brought into the courtroom after her name was called, that she was in the company of her father, that she was clutching him with her arm around his waist and apparently his arm was around her shoulder, that she was taken to the Clerk's stand to be sworn in, and I personally did not hear her say anything, although I heard Mr. Cioni try to talk to her. The Judge was in front of her, maybe he heard something, but it seemed to me it was so highly prejudicial we would move for a mistrial. We feel that the defendant cannot get a fair trial if this girl is dragged into the courtroom like an exhibit or something.

"MR. McDONALD: My response —

"MR. KEMPER: This all could have been avoided by having the hearing we asked for in the first place and that was the purpose of it.

We would ask the Court grant a mistrial.

"MR. McDONALD: In response, I was advised prior to bringing that girl into the courtroom today, and I would avow to the Court, by the girl's mother, that during their conversations over the weekend, since Friday, the little girl had indicated to her mother that if the occasion arose that she were to take the stand and give testimony, that she would by a nod of the head designate whether the defendant had touched her.

Prior to going in there today, it was my belief that

the girl would at least go and raise her hand, assume the witness stand. However, I think that the point in her not going in there is not prejudicial. The trial judge witnessed the entire incident. I think that it effectively impeaches what the defendant's own statements were, made in the presence of the jury during his testimony, that this little girl was competent to come in and state the other side of the story.

"THE COURT: Anything else you want to add?

"MR. KEMPER: No.

"THE COURT: Mona's first appearance in court did not indicate she could not testify. The testimony of the witnesses indicates that she probably could testify.

Her conduct moments ago indicated a very frightened, very shy, little girl, and I will proceed with the competency hearing out of the presence of the jury to determine whether or not she really can testify to the facts in issue.

The motion of the defendant for a mistrial is denied."

After the competency hearing in chambers, the court determined that the little girl should not be allowed to testify.

Our statutes state:

"The following shall not be witnesses in a civil action:

* * *

"2. Children under ten years of age who appear incapable of receiving just impressions of the facts respecting which they are to testify, or of relating

them truly." § 12-2202 (2) A.R.S.

And:

"The laws for determining competency of witnesses in civil actions are also applicable to criminal actions and proceedings, except as otherwise provided by this chapter." § 13-1801 A.R.S.

Rule 43 (c) of the Rules of Civl Procedure, 16 A.R.S., reads as follows:

"Examination by court as to disqualifications. When a child under ten years of age, or person apparently of weak intellect, is called as a witness, the court may examine him to ascertain his capability, and whether he understands the nature and obligation of an oath."

Although Rule 43 (c) would appear to provide that a child under ten years of age may be called as a witness before the court conducts a competency hearing, as was done here, we believe the order in which this occurs is left to the discretion of the trial judge. In State v. Harris, 107 Ariz. 41, 481 P.2d 504 (1971), we impliedly approved the procedure of conducting the hearing out of the presence of the jury before ruling that the witness could be called. In the instant case the witness was called first and under Rule 43 (c) we find no error. Also, the defendant contended on the stand that the witness was capable of testifying as to the facts indicated, and it was proper to allow the jury to at least see the witness and her demeanor to ascertain themselves whether or not the witness could testify as the defendant contended she would have been able to do. We find no error.

Sufficiency of the Evidence

The defendant at oral argument raised the question of

the sufficiency of the evidence to support a conviction for child molestation. The testimony of the State is unique in that it consisted of the introduction of the photographs of the defendant, plus some foundational material which went to the identity of the victim and her mental state. Thus, the only evidence upon which the conviction is based are the photographs previously described.

In at least four of the photographs the jury could believe that there was a touching of the private parts of the victim through her shorts, and in at least several of the other pictures the victim would most certainly have seen the defendant exposed. It is contended by the defendant that neither of these things happened. We believe that the jury was able to reasonably infer from these pictures that the defendant did in fact commit the acts for which he was charged, and that the court properly denied the motion for directed verdict at the end of the State's case as well as the motion for acquittal. We cannot restrain ourselves from stating that this is a case in which one picture is worth a thousand words.

Judgment and sentence affirmed.

APPENDIX B

IN THE
SUPREME COURT OF THE STATE OF ARIZONA
In Division

The State of Arizona,
Appellee,
vs.
Robert Tate Kasold,
Appellant.

No. 2819

Appeal from the Superior Court of Maricopa County
Cause No. CR-74620
The Honorable Frederic W. Heineman, Judge

SENTENCES AFFIRMED

Gary K. Nelson, The Attorney General — Phoenix
By Shirley H. Frondorf, Special Assistant Attorney General
Attorneys for Appellee

Derickson & Kemper — Phoenix
By James Hamilton Kemper
Attorneys for Appellant

CAMERON, Vice Chief Justice

This is an appeal from sentences only after jury verdicts and judgments of guilt to six counts of rape, second degree, § 13-611 (B), as amended 1962, and § 13-614 (B) A.R.S., together with sentences as to each count of not less than fifteen years nor more than life, all sen-

tences to run concurrently.

We need consider only one question on appeal and that is whether the search of the defendant's premises was made as a result of a constitutionally infirm search warrant.

The facts necessary for a determination of this matter on appeal are as follows. In December of 1972, a female student at North Phoenix Union High School in Phoenix, Arizona, told school authorities that during the previous spring she and another student had engaged in sexual activities with the defendant, Robert Kasold, an English teacher at the high school. The school authorities interrogated the other student and the police were called to conduct a further investigation. On the 2nd day of January, 1973, an affidavit in support of a request for a search warrant was filed with Justice of the Peace Al Flood. The affidavit, after describing the name of the defendant and the places to be searched (the apartment and the automobile), contained the following:

"That the following facts establish probable cause for believing that grounds for the issuance of a search warrant for the aforementioned items exist:

"Two 17 year old female students from North Phoenix High School have revealed that they were sexually involved with MR. ROBERT KASOLD, a teacher at the school. Their involvement lasted from March until July, 1972. During this time the suspect took numerous photographs of the victims and himself in sexual activity.

• • •

"Between the dates *December 20* and *December 21, 1972*, the affiant learned the following information in the following manner:

"Your affiant is a Police Detective for the City of Phoenix Police Department assigned to the Crimes against Persons Detail, and has recently been involved in an investigation concerning illicit sexual activity involving a high school teacher, Robert Kasold. During the course of this investigation your affiant personally interviewed two 17 year old females who are students at North Phoenix High School where Mr. Kasold is employed as a teacher.

"Both of these young girls told your affiant that they had been engaged in sexual activities with Mr. Kasold. This activity included heterosexual intercourse, fellatio, cunnilingus and sodomy. This activity took place in a house trailer located in the 1600 block East Thomas, in Mr. Kasold's classroom and in his vehicle. During these periods of sexual activities, Mr. Kasold took photographs depicting the activity, in addition Mr. Kasold caused these two students to write stories concerning their sexual life.

"Frequently during the sexual activity Mr. Kasold used a blue and white vibrator to stimulate the girls sexually.

"Also during some of the periods of sexual activity the girls themselves took photographs. Some of these photographs were removed by the girls and subsequently shown to a classmate.

"These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apt. E-425.

"During the course of this investigation, your affiant

has personally determined that Mr. Kasold is, in fact, a teacher employed by North High School and that he does in fact now reside at 5105 North 40th Street, Apt. E-425, and further that Mr. Kasold possesses a vehicle that is a 1968 Citron bearing Arizona license MMD-942.

"Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling.

"Further investigation has revealed that Mr. Kasold has spent an unusually large amount of time engaging in extra-curricular activities with the students.

"Your affiant has personally spent several hours in meticulously examining statements given by these two females and feels confident that the allegations by the girls in this matter are true.

"On 1/2/73 one of the young girls was examined by means of a polygraph regarding the above allegations. The results of this polygraph indicate that she has been truthful in her statements.

"Investigation also revealed that suspect has written stories about his sexual activity and has pursuaded the young girls to write stories describing their sexual activity. This writing is believed to be in the possession of the suspect at this time."

As the result of the search warrant, between 500 and 600 photographs of a sexual nature, as well as books and other sex-related paraphernalia were obtained. Included in the photographs were pictures of the two victims involved in this particular case, as well as a role of film upon which the conviction of the defendant in the companion case, State v. Kasold, No. 2818, filed this day, was based.

The defendant made a timely motion to suppress all of these items based upon the ground that the seizure was an unlawful search and seizure in violation of the Fourth and Fourteenth Amendments to the United States Constitution as interpreted by the United States Supreme Court. Specifically, defendant contends that the affidavit did not state probable cause and also that such information that it did contain was stale, being over five months old. The motion to suppress was denied.

The items contained in the search warrant were not introduced during the trial of the case, that case being determined primarily by the testimony of the two victims, but was used during the hearing in mitigation and aggravation over the objections of the defendant and formed the basis of the judge's sentences which were imposed in this case.

We have read the affidavit as set forth in this opinion. We believe that the affidavit states probable cause upon which to base the issuance of a warrant. Our Court of Appeals has stated:

> "The United States Supreme Court has laid down a two-pronged test for evaluating whether or not probable cause exists to issue a warrant. (citations omitted) The magistrate must be presented with (1) facts showing the informant is reliable and (2) the underlying circumstances on which the substance of the 'tip' is made. And, as further clarified in *Spinelli*, supra, the magistrate must generally assure himself that the information is not merely based

upon casual rumor or the individual's general reputation." State v. Ramos, 11 Ariz. App. 196, 199, 463 P.2d 91, 94 (1969).

Defendant, while admitting that the girls were reliable, contends that the affidavit does not set forth sufficient facts upon which the magistrate could assure himself that the evidence was probably in the place to be searched. We disagree.

In the instant case, not only do the girls appear to be reliable, one girl having submitted to a polygraph test to determine her reliability, but the underlying circumstances upon which the information was based appear to be equally reliable.

The two girls indicated that the defendant took their pictures and was in possession of these pictures, books, and written stories of their sexual activities. There was, we believe, sufficient information upon which the magistrate could find probable cause to believe that the evidence existed at the place to be searched.

Defendant further contends, however, that the information upon which the warrant was based was stale and therefore the magistrate did not have probable cause to believe that the evidence would still be there after more than five months. We do not believe, based upon the facts in the instant case, that the five month or more delay in the obtaining of the warrant makes the information obtained under the warrant subject to suppression. The authorities acted with dispatch as soon as the facts were made known to them. The evidence sought to be obtained was not the type which would likely be consumed or thrown away in the five months, such as alcohol, People v. Siemieniec, 368 Mich. 405, 118 N.W.2d 430, 100 A.L.R.2d 522 (1962); Terry v. State,

123 Ga.App. 746, 182 S.E.2d 513 (1971), or narcotics, Ashley v. State, 251 Ind. 359, 241 N.E.2d 264 (1968); State v. Ingram, 251 Ore. 324, 445 P.2d 503 (1968).

We agree with the United States Court of Appeals for the Fifth Circuit which upheld a search warrant based upon information more than six months old:

> "It is true that an affidavit used to support a search warrant 'must speak as of the time of the issue of that warrant'. Sgro v. United States, 1932, 287 U.S. 206, 211, 53 S.Ct. 138, 140, 77 L.Ed. 260, 263. See Rider v. United States, 5 Cir. 1966, 355 F.2d 192. There is, however, no arbitrary time limit on how old the information contained in an affidavit may be. ***" United States v. Guinn, 454 F.2d 29, 36 (5th Cir. 1972).

In the instant case, there were pictures of a sexual nature which it is reasonable to believe the defendant intended to keep. We do not believe that the staleness of the information indicates lack of probable cause, and the motion to suppress was properly denied. The items, being material, we admissible for the purpose of sentencing.

Even assuming, however, that the warrant was invalid, defendant may not prevail. In sentencing, a judge may consider information which might not be admissible at a trial, but which is certainly relevant for the purpose of sentencing, State v. Munoz, 110 Ariz. 419, 520 P.2d 291, No. 2855, filed 21 March 1974, and we have recently held that an item obtained as the result of an illegal search warrant may be used as a basis for sentencing. State v. Benge, 110 Ariz. 473, 520 P.2d 843, No. 2545, filed 4 April 1974.

Sentences affirmed.

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

Robert Tate Kasold, *Petitioner,* *vs.* Harold Cardwell, Warden, Arizona State Prison, *Respondent*	No. CIV 74-541 PHX - CAM

IT IS HEREBY ORDERED that this Court having received and considered petitioner's petition for writ of habeas corpus dated August 7, 1974; and having received and considered the respondent's response to said petition dated September 20, 1974; and having on April 7, 1975, considered the evidence and oral argument relating to the petition in a hearing coming regularly before this Court, finds that the petition should be granted.

The relevant facts are agreed upon by petitioner and respondent. In December of 1972, a female student at North Phoenix High School in Phoenix, Arizona, reported to school officials that she had earlier had sexual relations with petitioner, Robert Tate Kasold, who at that time was a teacher at the school. The female student reported that another female student had also had sexual relations with petitioner. Both of the female students were under eighteen years of age at the time of the reported incidents. School officials relayed this information to the Phoenix Police Department and a detective conducted an investigation and interviewed

both of the girls involved. On January 2, 1973, the detective went before a magistrate to secure a search warrant on the basis of the following affidavit:

> "Two 17 year old female students from North Phoenix High School have revealed that they were sexually involved with Mr. Robert Kasold, a teacher at the school. Their involvement lasted from March until July, 1972. During this time the suspect took numerous photographs of the victims and himself involved in sexual activity.
>
> Your affiant is a police detective for the City of Phoenix . . . and has recently been involved in an investigation concerning illicit sexual activity involving a high school teacher, Robert Kasold. During the course of this investigation, your affiant personally interviewed two 17 year old females who are students at North Phoenix High School where Mr. Kasold is employed as a teacher.
>
> Both of these young girls told your affiant that they had been engaged in sexual activities with Mr. Kasold. This activity included hetrosexual (sic) intercourse, fellatio, cunnilingus and sodomy. This activity took place in a house trailer located in the 1600 block of East Thomas, in Mr. Kasold's classroom and in his vehicle. During these periods of sexual activity, Mr. Kasold took photographs depicting the activity, in addition Mr. Kasold caused these two students to write stories concerning their sexual life. Frequently during the sexual activity, Mr. Kasold used a blue and white vibrator to stimulate the girls sexually.
>
> Also during some of the periods of sexual activity, the girls themselves took photographs. Some of

these photographs were removed by the girls and subsequently shown to a classmate.

These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apartment E-425.

During the course of this investigation, your affiant has personally determined that Mr. Kasold is, and in fact, a teacher employed by North Phoenix High School and that he does, in fact, now reside at 4105 North 40th Street, Apartment E-425, and further that Mr. Kasold possesses a vehicle that is a 1968 Citron (sic) bearing Arizona License MMD-942.

Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling.

Further investigation has revealed that Mr. Kasold has spent an unusually large amount of time engaging in extracurricular activities with the students.

Your affiant has personally spent several hours in meticulously examining statements given by these two females and feels confident that the allegations by the girls in this matter are true.

On January 2, 1973, one of the young girls was examined by means of a polygraph regarding the above allegations. The results of this polygraph indicate that she has been truthful in her statements.

Investigation also revealed that suspect has written stories about his sexual activity and has pursuaded (sic) the young girls to write the stories describing their sexual activity. This writing is believed to be in the possession of the suspect at this time."

Proceeding on the basis of a search warrant issued on the above affidavit, police officers, on the same date the warrant was issued (January 2, 1973), searched petitioner's apartment and seized photographs, books and magazines, a roll of film, and other items. All of the items seized dealt with sex.

Petitioner was involved in two separate trials in the state court, where the evidence in question was used. In the child molestation trial, Maricopa County Superior Court Cause No. CR-74621, the evidence seized under the warrant was used at trial and was essential to the basis of the conviction. The sentence imposed in the child molestation trial was not less than twenty years, nor more than life imprisonment. In the second degree rape trial, Maricopa County Superior Court Cause No. CR-74620, the evidence was not used at trial, however, it was used at petitioner's aggravation/mitigation hearing, and petitioner was sentenced to not less than fifteen years, nor more than life imprisonment on each of six counts — the sentences to run concurrently. The Arizona Supreme Court affirmed petitioner's child molesting conviction in *State v. Kasold*, 521 P.2d 990 (1974); and petitioner's second degree rape conviction in *State v. Kasold*, 521 P.2d 995 (1974), thereby upholding the search here in question.

Petitioner, at all appropriate times, moved to suppress the evidence seized claiming that the search was legally infirm since the warrant was not issued on a showing of

probable cause. Petitioner's primary claim is that the affidavit presented to the magistrate related information which was observed by the female students at least five months prior to the issuance of the warrant, and that, therefore, the observations were too stale to constitute probable cause. Petitioner also claims that because he had changed his residence since the girls observed the evidence, this change of location worked against a finding of probable cause, i.e., the girls had not observed the evidence in the apartment where the petitioner lived at the time of the search.

In the hearing on the motion to suppress in the state court, the detective who had presented the affidavit to the magistrate testified as to some information that he had related to the magistrate which was not in the affidavit. R.T. Vol. 1 at 13-18. It is undisputed that this other information before the magistrate was not recorded. The Supreme Court of the State of Arizona in *The State of Arizona v. Delma Robertson* (No. 3079-PR) filed February 24, 1975, held that under A.R.S. § 13-1444(c), if information in addition to that in a signed affidavit is to be considered by a magistrate for making a determination of probable cause, it must be under oath and it must be recorded. The court made it clear that this is not a new interpretation of the law and recognized that this law became effective August 13, 1971, which would cover the events of this case. Therefore, the search must stand or fall on the affidavit. Even if the unrecorded information were considered, there would still be an absence of probable cause since this information doesn't relate to sexual activity, photographs depicting sexual activity, or anything else which can objectively be connected with the warrant in this case.

The parties have agreed that the police did not sit on

the information once received. The police acted with dispatch in securing a warrant when they were given the information. Thus, there is no allegation or evidence of police misconduct. Therefore, the primary issue here is whether the information upon which the search warrant was based was too stale to constitute probable cause. The observations of the female students were over five months old, i.e., from the last time the girls saw the items sought to be seized until the time of the search.

Petitioner brings numerous cases to the Court's attention on the issue of whether stale information can support a search warrant. *See* Annot, 100 A.L.R. 2d 525 (1965). In *Durham v. United States*, 403 F.2d 190, 193 (9th Cir. 1968), the court held:

> "The most convincing proof that the property was the possession of the person or upon the premises of some remote time in the past will not justify a present invasion of privacy. There must be reasonable grounds for believing that the immediate search for which authority is sought may be fruitful."

The Court in *Durham, supra,* in Footnote 6, stated:

> "The length of the time lapse alone is not controlling since even a brief delay may preclude an inference of probable cause in some circumstances while in others a relatively long delay may not do so. Nonetheless, there are obviously some limits. In Schoeneman v. United States, 115 U.S. App.D.C. 110, 317 F.2d 173, 177 (1963), Judge Wright noted 'that the Government could cite, and we could find, no case which sustained a search warrant issued more than 30 days after finding of the evidence which constituted the basis for the search.' It has

> also been stated that 'a lapse of more than 7 weeks has always rendered the search warrant nugatory.' Annot., 100 A.L.R.2d 525, 527 (1965)."

The case of *United States v. Neal*, 500 F.2d 305, 309 (10th Cir. 1974), held:

> "The Fourth Amendment contemplates that probable cause for the issuance of a search warrant must exist at the time the search is sought to be made. Probable cause existing at some time in the past will not suffice unless circumstances exist from which it may be inferred that the grounds continued to the time the affidavit was filed."

Therefore, the affidavit must be examined to determine whether there are facts therein stated "from which it may be inferred that the grounds (for the search) continued to the time the affidavit was filed." A fair reading of the affidavit reveals no facts from which it may be inferred that the grounds for the search continued until the time the affidavit was filed. It is undisputed that probable cause for the search in question existed at some time in the past. This, however, is not dispositive of the issue before this Court, i.e., whether the affidavit contained facts which could support a present search of petitioner's premises. One paragraph of the affidavit states in a conclusional manner:

> "These girls further told your affiant that Mr. Kasold keeps some of the photographs in his classroom. He keeps others in his vehicle and others in his apartment located at 5105 North 40th Street, Apartment E-425."

The search in question is the search of petitioner's apartment at 5105 North 40th Street. There is nothing in the affidavit to indicate that the girls had even been to

petitioner's new address on North 40th Street, since the activities complained of occurred "in the 1600 block of East Thomas." Further, there are no facts to support the statement that petitioner kept certain photographs in his apartment. How was this knowledge obtained? When was it obtained? These are questions for which the affidavit provides no answer. When the privacy of an individual is to be invaded, vague statements and innuendo cannot take the place of specific facts which can be reviewed by an objective tribunal. *See Spinelli v. United States*, 393 U.S. 410 (1969), and *Aguilar v. Texas*, 378 U.S. 108 (1964).

Another paragraph in the affidavit states:

> "Further investigation into this matter by your affiant has revealed that prior to this time Mr. Kasold's activity as it relates to dealing with his students has been the subject of concern by various school administrators and that he has been the subject of psychological counselling."

The respondent would have this statement constitute a finding of a continuous course of conduct. The statement, however, lends no support for the search in question since it in no way deals with the specifics of this case. The statement is vague and relates nothing about petitioner's sexual activity or the photographs which were seized.

This Court is aware of the teachings of *United States v. Ventresca*, 380 U.S. 102 (1965), where the United States Supreme Court made it clear that courts reviewing the sufficiency of search warrants cannot demand "technical requirements of elaborate specificity once exacted under common law pleadings. . . ." In the facts at bar, however, this Court is not invoking a procedural

technicality, but is recognizing the absence of any information which could support the issuance of a search warrant at petitioner's residence on North 40th Street.

This Court does not intimate that there is an automatic cut off date from the time of observations upon which the search warrant is based until the issuance of the warrant, after which time there cannot be a finding of probable cause. The facts of this case, i.e., the long period of time between the observations and the issuance of the warrant; petitioner's move to another residence concerning which there was no evidence to cause a reasonable person to believe that the items sought were in that residence; the absence of specific facts to support a finding of a continuous course of conduct; and the vagueness of the warrant itself; all work against a finding of probable cause.

Therefore, the petition is hereby granted and the conviction in the child molesting case, Maricopa County Superior Court, Cause No. CR-74621, is set aside since it is not disputed that without the evidence seized, petitioner could not have been convicted.

IT IS FURTHER ORDERED that this case shall be remanded to the state courts for resentencing in Maricopa County Superior Court, Cause No. CR-74620, on the second degree rape offenses, in light of *Verdugo v. United States*, 402 F.2d 599 (9th Cir. 1968). The sentencing judge in the state court in petitioner's case testified as a witness in the hearing held by this Court that he did not think the evidence, herein held inadmissible, influenced his sentencing of petitioner in the statutory rape case. This Court believes that this matter should be remanded to the state courts for such proceedings as the sentencing court may wish to order,

so that the state court judge may reevaluate his sentence acting as a judge and not as a witness testifying in this Court. Furthermore, this Court does not consider it appropriate that the sentence in this case should be a matter for any judge to consider other than the original sentencing judge.

DATED: April 29, 1975.

C. A. MUECKE
United States District Judge

Supreme Court, U. S.
FILED
AUG 14 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA AND IOWA

RICHARD C. TURNER
Attorney General of Iowa

State Capital Building
Des Moines, Iowa 50319

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Assistant Attorney General

OFFICE OF INDIANA
ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204

Telephone: (317) 633-6234

Central Publishing Company, Inc., Indianapolis, Ind. 46206

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Opinion Below	1
Jurisdiction	2
Consent of Parties	2
Question Presented	2
Constitutional Provisions Involved	3
Interest of the Amici	4
Statement of the Case	5
Argument	6
Conclusion	18

TABLE OF AUTHORITIES

CASES

	Page
Aguilar v. Texas, 378 U. S. 108 (1964)	9, 15
Elkins v. United States 364 U. S. 206 (1960)	17
Johnson v. United States, 333 U. S. 10 (1948)	13
Malloy v. Hogan, 378 U. S. 1 (1964)	17
Mapp v. Ohio, 367 U. S. 643 (1961)	8
Michigan v. Tucker, 94 S. Ct. 2357 (1974)	15, 16
People v. Defore, 242 N.Y. 13, 150 N.E. 585 (1926)	17
Rice v. Wolff, (D. C. Neb., 1974) 388 F. Supp. 185	2
Rice v. Wolff, (8th Cir., 1975) 513 F. 2d 1280	2, 6
Spinelli v. United States, 393 U. S. 410 (1969)	9, 10
State v. Rice, 188 Neb. 728, 199 N. W. 2d 480 (1972)	2
Twining v. New Jersey, 211 U. S. 78 (1908)	17
United States v. Calandra, 94 S. Ct. 613 (1974)	8, 16
United States v. Harris, 403 U. S. 573 (1971)	16
United States v. Ventresca, 380 U. S. 102 (1965)	13
Weeks v. United States, 232 U. S. 383 (1914)	8

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

	Page
Fourteenth Amendment to the Constitution of the United States	4, 17
Fourth Amendment to the Constitution of the United States	3, 9, 12

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED—Continued

	Page
Ninth Amendment to the Constitution of the United States	3, 17
Tenth Amendment to the Constitution of the United States	3, 17
28 U.S.C. § 1254 (1)	2

OTHER AUTHORITIES

Rule 42 of the Rules of the Supreme Court of the United States	1, 2

IN THE

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

BRIEF ON THE MERITS IN SUPPORT OF PETITIONER SUBMITTED AMICUS CURIAE BY THE STATES OF INDIANA AND IOWA

The State of Indiana, by Theodore L. Sendak, Attorney General of Indiana, and Donald P. Bogard, Assistant Attorney General, and the State of Iowa, by Richard C. Turner, Attorney General of Iowa, pursuant to Rule 42 of the Rules of the Supreme Court of the United States, submit their *amicus curiae* brief on the merits in support of the Petitioner in the above-entitled cause.

OPINION BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit (hereafter Eighth Circuit) is reported

as *Rice v. Wolff,* (8th Cir., 1975) 513 F.2d 1280, and may be found at pages 28 through 57 of the Appendix attached to the Petition for Writ of Certiorari (hereafter Cert. App.).

The opinions of the United States District Court for the District of Nebraska (hereafter District Court) are reported as *Rice v. Wolff,* (D.C. Neb., 1974) 388 F. Supp. 185, and may be found at Cert. App. 58 through 97.

The opinion of the Supreme Court of Nebraska is reported as *State v. Rice,* 188 Neb. 728, 199 N.W. 2d 480 (1972).

JURISDICTION

This Court has jurisdiction to review this cause by writ of certiorari pursuant to 28 U.S.C. § 1254(1), and has accepted it for such purposes by granting said writ on June 30, 1975.

CONSENT OF PARTIES

The *amicus curiae* brief is filed by the States of Indiana and Iowa pursuant to Rule 42 of the Rules of this Court and consent of the parties is not required pursuant to Rule 42(4).

QUESTION PRESENTED

1. Whether, in a state court proceeding, the exclusionary rule should be modified to admit relevant,

competent evidence which was obtained pursuant to a search warrant and an arrest warrant later held invalid by a federal district court, and which was obtained under the most exigent circumstances and in the exercise of the utmost good faith by the law enforcement officers and the courts, when the imposition of that rule will provide no deterrent effect and can serve no valid purpose?

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Ninth Amendment to the Constitution of the United States provides:

> "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

The Tenth Amendment to the Constitution of the United States provides:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively or to the people."

The Fourteenth Amendment to the Constitution of the United States provides, in part:

> "§ 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

INTEREST OF THE AMICI

The States of Indiana and Iowa submit this brief since the questions presented by the State of Nebraska are equally vital to Indiana, Iowa, and all other states in the Union. The decisions by the District Court and the Eighth Circuit confound and confuse the officials of the various states that are charged with administration and enforcement of the system of criminal justice in the states.

This case involves the exclusion of evidence in a federal habeas corpus proceeding that was obtained pursuant to a search warrant and an arrest warrant issued by a magistrate and found to be valid by the Supreme Court of Nebraska. Altogether, a total of nine (9) judges from the State of Nebraska examined and approved the issuance of the warrants in question. However, in a proceeding for post-conviction relief and an appeal therefrom, the federal judiciary concluded that the search warrant was not valid.

This type of action by the federal judiciary totally disrupts the valid state function of the administration of a system of criminal justice. Cases involving the exclusion of relevant evidence make up a large percentage of all criminal appeals in the State of Indiana, and the same

is undoubtedly true in all other states. Therefore, Indiana, Iowa, and all other states have a valid interest in having this Court modify the exclusionary rule to allow the admission of evidence in state court proceedings obtained under search warrants fully approved by judges of the state courts.

The administration of a system of criminal justice in a state is a right and a power reserved to the states by the Constitution, and further encroachment on that right and reserved power cannot be tolerated by the states if the Federal system is to be valid at all.

STATEMENT OF THE CASE

The *amici* accept and adopt the "Statement of the Case" contained in Petitioner's brief on the merits.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD BE MODIFIED TO ADMIT RELEVANT, COMPETENT EVIDENCE OBTAINED PURSUANT TO SEARCH AND ARREST WARRANTS LATER HELD INVALID WHEN THE EVIDENCE WAS OBTAINED UNDER THE MOST EXIGENT CIRCUMSTANCE AND IN THE EXERCISE OF THE UTMOST GOOD FAITH, AND WHEN THE IMPOSITION OF THAT RULE WILL PROVIDE NO DETERRENT EFFECT AND CAN SERVE NO VALID PURPOSE.

This case is in this Court upon the granting of a Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit from a case entitled *Rice v. Wolff*, (8th Cir., 1975) 513 F. 2d 1280. In the opinion issued in that cause, the Eighth Circuit stated at page 1289:

> "The decisions of the Supreme Court convincingly demonstrate, and we so hold, that the district court was left with no choice but to conclude that the affidavit of Sergeants Pfeffer and Swanson was insufficient to establish probable cause. Consequently, the district court was correct in holding that the search warrant was invalid."

The search warrant involved was secured by the Omaha Police Department following six (6) days of intensive investigation that had commenced after Omaha Police Officer Minard had been killed on August 17, 1970 by a bomb contained in a booby-trapped suitcase which was located in an empty house to which the Police had been

dispatched to investigate an anomymous report of a screaming woman.

Those six days of investigation had narrowed the suspects in the bombing to an organization entitled the National Committee to Combat Fascism (hereafter N.C.C.F.) and three of its officers and members, namely Edward Poindexter, Duane Peak and David Rice, the Respondent herein.

On the afternoon of August 22, 1970, arrest warrants were issued for Poindexter and Peak. A Police Task Force went to the N.C.C.F. headquarters and discovered a large amount of ammunition and firearms, and arrested a member of N.C.C.F. named Cecil.

Unable to locate Poindexter and Peak, the Task Force first went to Poindexter's house, then to Peak's, and still being unsuccessful, proceeded to Rice's house at 2816 Parker Street. By the time the Police arrived at Rice's house they had been advised by Donald Peak that his brother Duane had been involved in the bombing (Brief Appendix P. 64, hereafter App. p. —) and that Rice, Poindexter and Peak had been at Rice's house when they constructed the bomb (App. p. 74).

When the Police arrived at Rice's house, there were lights on and a television set was playing. After knocking and receiving no response, two members of the Task Force determined that they should attempt to secure a search warrant for the Rice house. The warrant was obtained in about an hour, and upon the officers return the search commenced with the officers discovering, in plain view, fourteen (14) sticks of dynamite, blasting caps, a six volt battery, wire, dykes, pliers, magnets, several weapons and some ammunition. (App. p. 12) The state district court and the Supreme Court of Nebraska both held the search warrant valid.

The District Court and the Eighth Circuit both held that there was not sufficient information presented to the issuing magistrate for him to have probable cause to issue the warrant, and therefore, the evidence discovered in plain view in the search conducted after receiving the warrant was excluded.

The Exclusionary Rule was first advanced by this Court in the case of *Weeks v. United States,* 232 U. S. 383 (1914), wherein this Court stated at page 393:

> "The case in the aspect in which we are dealing with it involves the right of the court in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority, by a United States Marshal holding no warrant for his arrest and none for the search of his premises . . . If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment declaring his right to be secure against such searches and seizures is of no value, and, so far as those thus placed are concerned, might as well be stricken from the Constitution . . .

This judge-made rule for many years was applied only to federal proceedings, but was subsequently expanded to include states in *Mapp v. Ohio,* 367 U. S. 643 (1961).

In *United States v. Calandra, 94 S. Ct. 613, 619 (1974)* this Court stated:

> "The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:
>
> "[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late." Linkletter v. Walker, 381 U. S. 618, 637, 85 S. Ct. 1731, 1742, 14 L. Ed. 2d 601 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable search and seizures:

> "The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it." Elkins v. United States, 364 U. S. 206, 217, 80 S. Ct. 1437, 1444, 4 L. Ed. 2d 1669 (1960).

. . . In sum, the rule is a judicially-created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved.

"Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally-seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served . . ."

This Court went on to discuss various "balancing" requirements in invoking the exclusionary rule, concluding that suppression of illegally-seized evidence against the search victim is an important method of effectuating the Fourth Amendment, but that the Fourth Amendment does not require adoption of every proposal that might deter police misconduct.

In the case at bar, the District Court held that the search warrant did not meet the probable cause requirements established by this Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). In *Aguilar,* the Houston Police secured a search warrant upon an affidavit that stated:

"Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbiturates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of the law." 378 U.S. at 109.

This Court held that that statement was not sufficient to show probable cause, and established a two-pronged test for affidavits based upon hearsay information: (1) that the magistrate "be informed of some of the underlying circumstances" to show the basis for the informant's conclusions, and (2) "some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' 378 U.S. at 114.

That holding was significantly expanded by *Spinelli, supra,* wherein this Court stated at pages 415 and 416:

". . . We believe, however, that the "totality of circumstances" approach taken by the Court of Appeals paints with too broad a brush. Where, as here, the informer's tip is a necessary element in a finding of probable cause, its proper weight must be determined by a more precise analysis.

"The informer's report must first be measured against *Aguilar's* standards so that its probative value can be assessed. If the tip is found inadequate under *Aguilar,* the other allegations which corroborate the information contained in the hearsay report should then be considered. At this stage as well, however, the standards enunciated in *Aguilar* must inform the magistrate's decision. He must ask: Can it fairly be said that the tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration? *Aguilar* is relevant at this stage of the inquiry as well because the tests it

establishes were designed to implement the long-standing principle that probable cause must be determined by a "neutral and detached magistrate," and not by "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10, 14 (1948). A magistrate cannot be said to have properly discharged his constitutional duty if he relies on an informer's tip which—even when partially corroborated—is not as reliable as one which passes *Aguilar's* requirements when standing alone."

In so holding however, this Court stated at page 419:

". . . In holding as we have done, we do not retreat from the established propositions that only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause, *Beck v. Ohio,* 379 U. S. 89, 96 (1964); that affidavits of probable cause are tested by much less rigorous standards than those governing the admissibility of evidence at trial, *McCray v. Illinois,* 386 U. S. 300, 311 (1967); that in judging probable cause issuing magistrates are not to be confined by niggardly limitations or by restrictions on the use of their common sense, *United States v. Ventresca,* 380 U. S. 102, 108 (1965); and that their determination of probable cause should be paid great deference by reviewing courts, *Jones v. United States,* 362 U. S. 257, 270-271 (1960). But we cannot sustain this warrant without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry."

A disinterested judicial officer interposed himself between the police and the citizens in this cause, and his decision was upheld by nine (9) state court judges. The *amici* would submit that the magistrate's finding of probable cause was the proper finding, and it should have been accepted by the Federal Courts.

The Fourth Amendment provides that ". . . no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." In this case a warrant was issued supported by an affidavit, particularly describing the place to be searched and the things to be seized. The Fourth Amendment requires no more.

The affidavit submitted to the magistrate was as follows:

> "The complaint and affidavit of Sgt. R. Pfeffer and Sgt. Jack Swanson, on this 22 day of August, 1970, who, being first duly sworn, upon oath says:
>
> "That he has just and reasonable grounds to believe, and does believe that there is concealed or kept as hereinafter described, the following property, to-wit: Dynamite and devices which could be used to construct devices which could cause injury to persons and damage to property. Also illegal weapons which he stated should be used against Police Officers.
>
> "That said property is concealed or kept in, on, or about the following described place or person, to-wit: A one story white frame house on Parker Street at 2816. In Omaha Douglas County, Nebraska.
>
> "That said property is under the control or custody of David Lewis RICE, Minister of Information, National Comittee [sic] to Combat Fascism.
>
> "That the following are the grounds for issuance of a search warrant for said property and the reasons for his belief, to-wit: David Rice is a known member of the National Comittee [sic] to Combat Fascism, which advocates the violent killing of Police Officers. A violent killing of a Police Officer occured [sic], in Omaha, and arrests were made from the membership of the NCCF. We have been told in the past that RICE keeps explosives, at his residence, and also

> illegal weapons, which he has said should be used against Police Officers.
>
> "A warrant authorizing a night-time search is requested because Nighttime when information was secured, and the property may be removed."

In reviewing affidavits to determine if there was probable cause to issue a search warrant, an appellate court must look at those affidavits as they were presented to the magistrate. In that regard, this Court's comments in *United States v. Ventresca,* 380 U.S. 102, 108 (1965) are significant:

> "[T]he Fourth Amendment's commands, like all constitutional requirements, are practical and not abstract. If the teachings of the Court's cases are to be followed and the constitutional policy served, *affidavits for search warrants,* such as the one involved here, *must be tested and interpreted by magistrates and courts in a commonsense and realistic fashion. They are normally drafted by nonlawyers in the midst and haste of a criminal investigation.* Technical requirements of elaborate specificity once exacted under common law pleadings have no proper place in this area. A grudging or negative attitude by reviewing courts toward warrants will tend to discourage police officers from submitting their evidence to a judicial officer before acting." (Emphasis supplied.)

Even though magistrates are required to be "neutral and detached," as stated in *Johnson v. United States,* 333 U.S. 10, 14 (1948), they still must exercise their responsibility promptly when called upon to do so. They do not have the luxury afforded appellate courts in studying the affidavit, having written briefs submitted by all parties on the sufficiency or non-sufficiency of the affidavit, hear-

ing oral argument from the interested parties, and then reflecting upon the question for several months. Magistrates are confronted with an immediate situation requiring prompt action.

In the case at bar, there had already been one bombing resulting in the death of Officer Minard, and dynamite was suspected of being kept in the house of one of the N.C.C.F. members suspected in that bombing. After six days of intensive investigation, Police Officers, searching for Poindexter and Peak, went to the house of Rice upon the belief Peak was there. Seeing lights on, hearing the television, and getting no response to their knock, two of the officers determined to secure a search warrant. Note that the officers did not draw their service revolvers, kick the door down and go busting inside. The prior decisions of this Court *worked* on those officers, and they left for an hour to get the warrant.

Obviously those two officers were not possessed of all the information known by the Omaha Police Department regarding the bombing case. Nevertheless, they gave their affidavit to the magistrate who made a common sense, realistic interpretation thereof and concluded that probable cause was present.

The affidavit certainly could have been expanded if all of the Police Officers having information had gone to the magistrate and laid out their entire case. However, under the extremely exigent circumstances that existed in Omaha at that time, it was not reasonable or feasible for the Police Department to so act.

In reviewing the existence of probable cause, this Court stated in *Aguilar, supra,* at page 111:

> "... when a search is based upon a magistrate's, rather than a police officer's, determination of probable

> cause, the reviewing courts will accept evidence of a less "judicially competent or persuasive character than would have justified an officer in acting on his own without a warrant," *ibid.*, and will sustain the judicial determination so long as "there was substantial basis for [the magistrate] to conclude that narcotics were probably present...." *Id.*, at 271.

Last term, in *Michigan v. Tucker,* 94 S. Ct. 2357, 2365 (1974), Justice Rehnquist, speaking for the majority, said:

> "Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the vagaries of human nature would make such an expectation unrealistic. *Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose.*
>
> *We have recently said, in a search and seizure context, that the exclusionary rule's "prime purpose is to deter future unlawful police conduct and thereby to effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures."* United States v. Calandra, — U.S. —, p. —, 94 S.Ct. 613, p. 619, 38 L.Ed.2d 561. We then continued:
>
> " 'The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effective available way—by removing the incentive to disregard it.' Elkins v. United States, 364 U.S. 206, 217 [80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669] (1960)." United States v. Calandra, p. —, 94 S.Ct., at p. 620.
>
> ...
>
> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least, negligent conduct, which has deprived the defendant of some right. By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating

officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." (Emphasis supplied)

Chief Justice Burger properly emphasized the inquiry regarding search warrants in *United States v. Harris,* 403 U.S. 573, 584 (1971), stating:

". . . the issue in warrant proceedings is not guilt beyond reasonable doubt but probable cause for believing the occurrence of a crime and the secreting of evidence in specific premises. See *Brinegar v. United States, supra,* at 173. . . ."

In determining probable cause, the cases of *United States v. Calandra, supra,* and *Michigan v. Tucker, supra,* both show that a balancing of interests must be made, and that the Court:

". . . must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also "must consider society's interest in the effective prosecution of criminals in light of the protection our pre-*Miranda* standards afford criminal defendants." Jenkins v. Delaware, 395 U.S. 213, 221, 89 S.Ct. 1677, 1681, 23 L.Ed.2d 253 (1969). These interests may be outweighed by the need to provide an effective sanction to a constitutional right, Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1941), but they must in any event be valued." 94 S.Ct. at 2367.

The exigent circumstances involved in this case are well detailed in the Petition for Writ of Certiorari, and it is undisputed that when the police searched Rice's home they discovered, in plain view, the very items described in the warrant in the exact location listed in the warrant. Those

items were highly dangerous devices used for making bombs, bombs similar to the one that had killed Officer Minard.

The *amici* would emphatically urge this Court to re-examine the exclusionary rule and to modify it to allow lawfully attained evidence such as that secured here to be admitted. The rule's purpose is to deter police "by removing the incentive to disregard it." *Elkins v. United States,* 364 U.S. 206, 217 (1960). This is not a case like *People v. Defore,* 242 N.Y. 13, 150 N.E. 585, 587 (1926) where Judge Cardozo made the oft-quoted statement that [t]he criminal is to go free because the constable has blundered." Here the Omaha Police did everything required of them, sought the necessary warrant, and ended up being punished for their efforts. A rule which does that and which allows freedom to radical elements who hide booby-trapped bombs to murder innocent, unsuspecting people, cannot have a valid place in the jurisprudence of the United States of America.

It may well be that this Court should reconsider its decisions which have merged the first eight amendments to the Constitution of the United States with the Fourteenth Amendment. In *Malloy v. Hogan,* 378 U.S. 1 (1964), this Court overruled *Twining v. New Jersey,* 211 U.S. 78 (1908), the well written decision that held the Fourteenth Amendment was not to be construed as applying those first eight amendments as constitutional limitations on state action.

Federal courts have steadily attempted to erode the power of states in recent years by compelling first one and then another of the first eight amendments on the states by virtue of the Fourteenth Amendment. In so doing, the courts have ignored the provisions of the Ninth and Tenth Amendments which reserve all rights and powers

not enumerated or delegated in the Constitution to the people and the states.

The case at bar is an excellent example of federal intrusion into an area of state responsibility whereby the federal courts overturned the valid decisions of nine state court judges, and excluded relevant, competent evidence from a state court trial.

The administration of criminal justice within a state is certainly one of the powers reserved to the states, and this Court should re-examine its decisions and allow the states to manage their own affairs.

CONCLUSION

For all the foregoing, the *amici* respectfully pray this Court reverse the decision of the Eighth Circuit and affirm the decision of the Supreme Court of Nebraska.

Respectively submitted

RICHARD C. TURNER
Attorney General of Iowa

State Capital Building
Des Moines, Iowa 50319

Respectively submitted

THEODORE L. SENDAK
Attorney General of Indiana

DONALD P. BOGARD
Assistant Attorney General

OFFICE OF INDIANA
ATTORNEY GENERAL
219 State House
Indianapolis, Indiana 46204
Telephone: (317) 633-6234

FILED
AUG 15 1975
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1222

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex,

Appellant,

-vs-

DAVID L. RICE,

Appellee.

ON WRIT OF CERTIORARI

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE AND BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE.

VERNON B. ROMNEY
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General
236 State Capitol
Salt Lake City, Utah 84114

TABLE OF CONTENTS

Page

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE 1

INTEREST OF AMICI 1

STATEMENT OF THE CASE 2

ARGUMENT 3

POINT I: THE EXCLUSIONARY RULE SHOULD BE ABOLISHED 3

A. THE EXCLUSIONARY RULE, AS ESTABLISHED BY *WEEKS* AND *MAPP*, IS BASED ON FAULTY REASONING, IS NOT CONSTITUTIONALLY MANDATED, AND IS UNJUSTIFIED BY THOSE DECISIONS 3

B. SINCE THERE IS NO EVIDENCE, AFTER SIXTY YEARS, THAT THE EXCLUSIONARY RULE HAS ACTUALLY DETERRED ILLEGAL POLICE CONDUCT, IT SHOULD BE ABOLISHED 13

C. THE EXCLUSIONARY RULE FAILS THE "BALANCING INTEREST TEST" AS SET FORTH IN THE *UNITED STATES V. CALANDRA* AND *MICHIGAN V TUCKER* DECISIONS AND THEREFORE SHOULD BE ABOLISHED 15

POINT II: IF THE EXCLUSIONARY RULE IS NOT ABOLISHED, IT SHOULD BE LIMITED SO AS NOT TO EFFECT

Page

CASES WHERE IT WILL HAVE LITTLE OR NO DETERRENT EFFECT 18

POINT III: THE COURT OF APPEALS' DECISION SHOULD BE REVERSED SINCE THERE WILL BE NO DETERRENT EFFECT IN THIS CASE 20

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

Elkins v. United States, 364 U.S. 206, 4 L.Ed.2d 1669, 80 S.Ct. 1437 (1960) 8, 14, 15

Irvine v. California, 347 U.S. 128, 98 L.Ed. 561, 74 S.Ct. 381 (1954) 15

Mapp v. Ohio, 367 U.S. 643, 6 L.Ed.2d 1081, 81 S.Ct. 1684 (1961) 4, 8, 14

Michigan v. Tucker, 417 U.S. 433, 41 L.Ed.2d 182, 94 S.Ct. 2357 (1974) 8, 12, 14, 16, 17, 19

Olmstead v. United States, 277 U.S. 438...., 72 L.Ed. 944, 48 S.Ct. 564 (1928) 5, 10, 11

Rice v. Wolff, 388 F.Supp. 185 (D. Neb. 1974) 8

Rice v. Wolff, 513 F.2d 1280 (8th Cir. 1975) 2, 8

Silverthorne Lumber Co. v. United States, 251 U.S. 385, 64 L.Ed. 319, 40 S.Ct. Rep. 182 (1920) 9, 10

Terry v. Ohio, 392 U.S. 1, 20 L.Ed.2d 889, 88 S.Ct. 1868 (1968) 8, 12, 14, 18, 19

United States v. Calandra, 414 U.S. 338, 38 L.Ed.2d 561, 94 S.Ct. 613 (1974) 8, 12, 14, 16

Page

Weeks v. United States, 232 U.S. 383, 58 L.Ed. 652, 34 S.Ct. 341 (1914) 4-14

Wolf v. Colorado, 338 U.S. 25, 93 L.Ed. 1782, 69 S.Ct. 1359 (1949) 5, 7, 9, 10, 14

OTHER AUTHORITIES

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 Chicago L. R. 4 (1970) 15

CONSTITUTIONS

United States Constitution, Amendment IV 4-10

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1222

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex,

Appellant,

-vs-

DAVID L. RICE,

Appellee.

ON WRIT OF CERTIORARI

MOTION OF THE ATTORNEY GENERAL OF THE STATE OF UTAH FOR PERMISSION TO FILE A BRIEF AMICUS CURIAE

Comes now the State of Utah, by and through its authorized representative, Vernon B. Romney, Attorney General, State of Utah, and hereby moves this Honorable Court for permission to file the following Brief Amicus Curiae pursuant to Rule 35, Supreme Court of the

United States Revised Rules, as amended, January 15, 1974. Said motion is based upon the fact that the State of Utah has an interest in the outcome of this case.

VERNON B. ROMNEY
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

In the Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1222

CHARLES L. WOLFF, JR., Warden, Nebraska Penal and Correctional Complex,

Appellant,

-vs-

DAVID L. RICE,

Appellee.

ON WRIT OF CERTIORARI

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF UTAH, AMICUS CURIAE

INTEREST OF AMICI

Among its several issues, *Wolff v. Rice,* No. 74-1222, presents to this Court the question of whether the exclusionary rule should be abolished or at least substantially modified in cases where it would have little or no deterrent effect. An adverse decision would continue the detri-

mental impact which the rule has had on criminal justice since its inception. The State of Utah respectfully submits its suggestions for change to this Honorable Court.

STATEMENT OF THE CASE

The following facts were taken from *Rice v. Wolff*, 513 F.2d 1280 (1975), the Court of Appeals, Eighth Circuit decision.

On August 17, 1970, two police officers were sent by the police dispatcher to an Omaha address where a woman was reportedly screaming. The house at the address was vacant. A booby-trap, consisting of dynamite, in a suitcase, was placed near the front door and when one officer, Larry Minard, tripped the detonating device, an explosion killed him instantly. By the 22nd of August, the investigation of the bombing had focused on one Duane Peak. Several persons had identified Peak as the individual who had reported to the police dispatcher that a woman was screaming. Also several people had seen Peak, prior to the murder, with a suitcase similar to the one used in the bombing. A warrant was issued for the arrest of Peak and the police sought him at various addresses where it was thought he might be hiding. That night the police came to the home of appellee David Rice. Lights and a television were on in the house, but there was no response to the officer's knock. The officers decided not to forcibly enter but to first acquire a valid search warrant. An affidavit was made and a municiple court judge issued a search wrrant. When the police returned to Rice's home they entered and found, in plain view, fourteen sticks of dynamite, blasting caps, wire, a battery,

and a pair of long nosed pliers. Later, Rice was arrested. At trial Rice moved the state trial court to suppress the various items seized by police. The trial court denied the motion to suppress, ruling that the search was legal pursuant to a valid search warrant. Rice was convicted and sentenced to life imprisonment. The primary attack by Rice on appeal to the Supreme Court of Nebraska was upon the trial court's refusel to suppress. However, the Nebraska Supreme Court affirmed the conviction and ruled that the search warrant was valid and the search legal.

A petition for a writ of habeas corpus was filed in federal district court and the court there declared that the affidavit in support of the search warrant was fatally defective, 388 F.Supp. 185 (D. Neb. 1974). The United States Court of Appeals, Eighth Circuit, affirmed the district court ruling, 513 F.2d 1280 (1975).

This Court granted certiorari, June 30, 1975, *Wolff v. Rice*, No. 74-1222.

ARGUMENT

POINT I

THE EXCLUSIONARY RULE SHOULD BE ABOLISHED.

A. THE EXCLUSIONARY RULE, AS ESTABLISHED BY *WEEKS* AND *MAPP* IS BASED ON FAULTY REASONING, IS NOT CONSTITUTIONALLY MANDATED, AND IS UNJUSTIFIED BY THOSE DECISIONS.

In *Weeks v. United States,* 232 U.S. 383 (1914), the Supreme Court ruled that any evidence obtained in violation of the Fourth Amendment would be inadmissible in federal courts. Forty-seven years later, in *Mapp v. Ohio,* 367 U.S. 643 (1961), this exclusionary rule was also imposed on state courts. The Court's decision in *Weeks, supra,* was based on the following premises: (1) courts are entrusted with the responsibility of giving the Fourth Amendment force and effect; (2) courts should not condone illegal conduct; and (3) the Fourth Amendment has no meaning without the exclusionary rule, 232 U.S. at 392, 394. The Court in *Mapp, supra,* concluded that the exclusionary rule should be forced onto the states for much the same reasons but also because (1) the rule is of constitutional dimension; (2) some states have adopted the exclusionary rule; (3) the right to privacy is as important as any other constitutional right; (4) federal-state law enforcement cooperation will be enhanced; and (5) although criminals may go free, it is the law that sets them free, 367 U.S. at 647-659.

If the above listed premises and reasons are carefully examined it is apparent that the exclusionary rule is neither a dictate of logic nor a constitutional mandate. Therefore, the rule, as an imperative, remains unsupported by the very decisions which generated its existence.

Weeks v. United States, supra, decided in 1914, is generally known as the origin of the exclusionary rule. Quoting from that case:

> "The case in the aspect in which we are dealing with it involves the right of the court

> in a criminal prosecution to retain for the purposes of evidence the letters and correspondence of the accused, seized in his house in his absence and without his authority. . . ." 232 U.S. at 393.
>
> "We therefore reach the conclusion that the letters in question were taken from the house of the accused . . . in direct violation of the constitutional rights of the defendant. . . . In holding them and permitting their use upon the trial, we think prejudicial error was committed." *Id.* at 398.

What was the basis for this conclusion, and subsequent decision, which was such a great departure from the common law, *Olmstead v. United States,* 277 U.S. 438 at 463 and 468 (1928), and from the law in almost every state? (*Wolf v. Colorado,* 338 U.S. 25 at 29 (1949), only one state, prior to *Weeks* had an exclusionary rule, *id.*). One of the major premises upon which the *Weeks* Court relied is that:

> "The effect of the 4th Amendment is to put the courts of the United States and federal officials . . . under limitations and restraints as to the exercise of [their] power . . . This protection reaches all alike, whether accused *of* crime or not, and the duty of giving [the 4th Amendment] force and effect is obligatory upon all intrusted under our Federal System with the enforce of the laws." 232 U.S. at 391-392.

However, from the above premise, it does not follow that evidence must be excluded which is otherwise credible and helpful in determining factual issues. Certainly the Fourth

Amendment places limitations on the powers of the courts. Courts are responsible for judging the constitutionality of laws and may not declare a law constitutional if it would allow the seizure of personal property in an unreasonable manner. Also the courts are restrained from issuing warrants without probable cause. It is just as certain that "this protection reaches all alike." Furthermore, courts do have the duty of giving "force and effect" to the Fourth Amendment. If a law enforcement officer is brought before the court and found to be guilty of the violation of a citizen's Fourth Amendment rights, that court has the responsibility of prescribing a punishment which will deter that officer from doing the same in the future. However, all of the above restraints and responsibilities admitted, the court need not give the Fourth Amendment "force and effect" by closing its eyes to reliable creditable evidence. The exclusionary rule is not required by the Fourth Amendment.

In another place the *Weeks* Court used the premise that courts should not "sanction" illegal searches and seizures and:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect, if not an open defiance, of the prohibitions of the Constitution." 232 U.S. at 394.

While it is perfectly true that to sanction illegal conduct would be to defy the constitution, that does not lead to the conclusion that a court which does not use the exclusionary rule is sanctioning illegal conduct. In other words, a court is not sanctioning murder because it allows a convicted murderer to testify against his accomplice. A court could demonstrate its disapproval for violators of the Fourth Amendment by the use of fines and jail sentences of by alternative methods.

The *Weeks* Court sought to justify the exclusionary rule by one other argument:

> "If letters and private documents can thus be [illegally] seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment . . . is of no value and . . . might as well be stricken from the constitution." 232 U.S. at 393.

The above statement would be comparable to saying that if every convicted criminal is not sentenced to life imprisonment, then laws have no meaning. Both statements are simply not true. The Supreme Court itself noted that:

> "But the ways of enforcing [the 4th Amendment] raise questions of a different order. How such arbitrary conduct should be checked, what remedies against it should be afforded, the means by which the right should be made effective, are all questions that are not to be so dogmatically answered as to preclude the varying solutions which spring from an allowable range of judgment on issues not susceptible of quantitative solution." *Wolf v. Colorado,* 338 U.S. at 28 (overturned by *Mapp v. Ohio*).

The Fourth Amendment can survive without the exclusionary rule and in fact would be a much more positive force in our society without it.

As is evident from the argument above, it is the State of Utah's opinion that the *Weeks* decision is replete with faulty conclusions.

Mapp v. Ohio, supra, decided in 1961, extended the exclusionary rule to state courts. This was done although the majority of state courts expressly rejected the *Weeks* exclusionary doctrine. (The Supreme Court pointed out that as of 1960, almost a half century after *Weeks*, only 44 percent of the states (22 of 50) were for total exclusion of evidence. *Elkins v. United States,* 364 U.S. 206, appendix table I at 224-225.) The *Mapp* decision, an extensive reach of power by the Court, hopefully represents the apex of the pendulum swing in the direction of the exclusionary rule. Later cases have not extended the doctrine but have, rather, realized the shortcomings of the rule. For example, see *Terry v. Ohio,* 392 U.S. 1 (1968), wherein the Court said:

> " . . . a rigid and unthinking application of the exclusionary rule, in futile protest against practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime." 392 U.S. at 15.

See also *United States v. Calandra,* 414 1 U.S. 338 (1974), and *Michigan v. Tucker,* 417 U.S. 433, 41 L.Ed.2d 182 (1974).

As the reasoning and logic of the *Mapp* majority opinion is examined, it becomes apparent that the court had little if any solid foundation for the action taken. The majority opinion begins with a short history of the exclu-

sionary rule, including a brief review of the *Weeks* decision, with small quotes from *Wolf v. Colorado, supra,* and *Silverthorne Lumber Co. v. United States,* 251 U.S. 385 (1920). Much material is quoted out of context, however, and the overall effect is a twisting of words, producing the desired result. At 367 U.S. 648 the majority said:

> "Finally, the court in [Weeks] clearly stated that the use of the seized evidence involved 'a denial of the constitutional rights of the accused.' "

What the Court in *Weeks* actually said was:

> " . . . [the defendant] having made a reasonable application for their return, which was heard and passed upon by the court, *there was involved in the Order refusing the application* a denial of the constitutional rights of the accused." (Emphasis added.)

Next the majority opinion made a fantastic claim that the exclusionary rule was constitutionally required, without offering any authority in support except for one case which did not even speak to the issue. The Opinion reads:

> "This Court has [since Weeks] required of federal law officers a strict adherance to [the exclusionary rule] which *this Court has held to be a clear, specific and constitutionally required*—even if judicially implied—deterrent safeguard without insistence upon which the Fourth Amendment would have been reduced to 'a form of words.' Holmes, J., Silverthorne Lumber Co.

v. United States. . . ." 367 U.S. 648. (Emphasis added.)

There is no authority whatsoever given for the announcement that the exclusionary rule is a "constitutionally required safeguard." It is true that the four words, "a form of words" are found in the *Silevrthorne* opinion but *Silverthorne* says nothing at all about a "clear, specific, and constitutionally required safeguard." On the contrary, in *Wolf v. Colorado, supra,* the Court held:

> "[The exclusionary rule] was not derived from the explicit requirements of the 4th Amendment; it was not based on legislation expressing congressional policy in the enforcement of the constitution. The decision was a matter of judicial implication." 338 U.S. at 28.

The statement from the *Mapp* opinion was not only unsupported by authority, it was also incorrect in its implications.

Next, the Majority Opinion in *Mapp* claims that the statement that "the exclusionary rule is of constitutional origin" remains entirely undistributed. 367 U.S. at 649. The Majority used *Olmstead v. United States, supra,* and *Wolf, supra,* as authority. But again the court takes passages from earlier opinions entirely out of context. *Wolf* did quote *Weeks* in saying that "the 4th Amendment barred the use of [illegally obtained evidence]," but then *Wolf* went on to say that *Weeks* was the first case to so hold and that the ruling was *not* required by the constitution or the legislature. Likewise, *Mapp* treats the *Olmstead* authority out of context, so that *Olmstead* appears to say exactly the reverse of what was actually said. *Mapp* says:

> "The Court, in Olmstead v. United States . . . in unmistakable language restated the Weeks rule: 'The striking outcome of the Weeks case and those which followed it was the sweeping declaration that the 4th Amendment, although not referring to or limiting the use of evidence in courts, really forbade its introduction if obtained by government officers through a violation of the Amendment [277 U.S. at p. 462.]' "

Granted, the above quote is an exact reproduction of the words of *Olmstead,* but it is apparent, even from the above language, that *Olmstead* was *not* in support of the exclusionary rule. The Majority (6-3) in *Olmstead* were against the exclusionary rule as is evidenced by other language from that opinion:

> "The common law rule is that the admissibility of evidence is not affected by the illegality of the means by which it was obtained." 277 U.S. at 467.
>
> "A standard which would forbid the reception of evidence if obtained by other than nice ethical conduct by government officials would make society suffer and give criminals greater immunity than has been known heretofore." *Id.* at 468.

It was the famous minority opinions in *Olmstead,* written by Holmes and Brandeis that supported the exclusionary doctrine.

In two other sections, the *Mapp* majority again makes statements which are either unjustifiable or completely lacking in authority. The main holding of the case, states:

> "We hold that all evidence obtained by searches and seizures in violation of the constitution is, by that same authority, inadmissible in a state court," 367 U.S. at 655.

There is, from the opinion itself, no justification for this extreme extension of power over the state court systems. As is pointed out by the minority opinion, the Supreme Court does not possess a general supervisory power over state courts (*Id.* at 678). Therefore, any requirement made by the Supreme Court over state courts would have to entail constitutional dimensions. And, as has been argued above, it is apparent that the exclusionary rule is *not* a requirement of the constitution. This fact is becoming increasingly more obvious in recent decisions. See *Terry v. Ohio, supra; United States v. Calandra, supra,* and *Michigan v. Tucker, supra.* Another claim which lacks authority and justification is the pronouncement that "the exclusionary doctrine [is] an essential part of the right to privacy." 367 U.S. at 656. Besides being unsupported by authority or logic, this statement is absurd, implying as it does that all people who enjoy the right to privacy also have criminal evidence to hide.

The dissenting opinion in the *Mapp* case evidenced better logic and reasoning:

> "Our concern here, as it was in Wolf, is not with the desirability of [the exclusionary] rule but only with the question whether the States are constitutionally free to follow it or not as they may themselves determine, and the relevance of the disparity of views among the States on this point lies simply in the fact that the judgment involved is a debatable one." 367 U.S. at 681.

> "I do not believe that the 14th Amendment empowers this Court to mould state remedies . . . to suit its own notions of how things should be done. . . ." 367 U.S. at 682.

> "I do not believe that this court is empowered to impose this much-debated procedure on local courts, however efficacious we may consider the Weeks rule to be. . . ." 637 U.S. at 683.

> "But in the last analysis I think this Court can increase respect for the Constitution only if it rigidly respects the limitations which the Constitution places upon it, and respects as well the principles inherit in its own process." 367 U.S. at 686.

Mr Justice Harlan concludes his dissenting opinion, in which Mr. Justice Frankfurter and Mr. Justice Whitaker join, by saying: "In the present case . . . our voice becomes only a voice of power, not of reason." (Citation omitted)

As is obvious from this examination of the *Weeks* and *Mapp* majority opinions, they are both based on faulty premises and poor logic and the exclusionary rule remains unjustified by them.

B. SINCE THERE IS NO EVIDENCE, AFTER SIXTY YEARS, THAT THE EX-

CLUSIONARY RULE HAS ACTUALLY DETERRED ILLEGAL POLICE CONDUCT, IT SHOULD BE ABOLISHED.

Several Supreme Court opinions since *Weeks* and *Mapp* have included comments on the exclusionary rule and its underlying purposes. For the past thirty years it has been widely recognized that the main purpose of the rule is to deter illegal police search and seizures by excluding any criminal evidence found during such a search. In *Wolf v. Colorado, supra,* there was one concurring opinion and two dissenting opinions. However, all nine justices agreed on one point, the exclusionary rule was designed to be a remedy against illegal searches and seizures by law enforcement officials, 338 U.S. at 31, 40-42. Eleven years later, in *Elkins v. United States, supra,* this Court held: "The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter. . . ." 364 U.S. at 217. Again, in *Mapp, supra,* the majority said that the exclusionary rule was a clear, specific, and constitutionally required *deterrent safeguard.* 367 U.S. at 648. (Emphasis added.) More recent cases also refer to the rule as a deterrent, *Terry v. Ohio, supra,* at 12, 13 and 29; *United States v. Calandra, supra,* at 347 and 348; and *Michigan v. Tucker, supra,* at 194.

The exclusionary rule may be "calculated to prevent," and its purpose may be to "deter" illegal police conduct but, if it does either one at all, it does so at a very high price to society. The question is, since the rule's purpose is to deter and since the price of the exclusionary rule is so high, is there sufficient evidence that the rule is performing its function? Utah's conclusion is no. After Sixty years there is no evidence that the exclusionary rule is effective as a preventative or deterrent measure against unconscionable police conduct. The Supreme Court, in *Irvine v. California,* 347 U.S. 128 (1954), said:

> "What actual experience teaches, we really do not know. Our cases evidence the fact that the federal rule of exclusion and our reversal of conviction for its violations are not sanctions which put an end to illegal search and seizure by federal officers. . . *There is no reliable evidence* known to us that inhibitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it." *Id.* at 135-7. (Emphasis added.)

Also, in *Elkins v. United States, supra,* it was admitted that empirical studies are not available to demonstrate any deterrent effect accomplished by the rule. 364 U.S. at 218. See also Oaks, *Studying the Exclusionary Rule in Search and Seizure,* Chicago L. R. 37:4, 1970, pp. 674-678.

Since the rule is not accomplishing the purpose for which it is used, and since the rule allows many criminals to go free, it is not reasonable nor necessary to continue the use of the exclusionary rule. Alternative approaches should be initiated.

C. THE EXCLUSIONARY RULE FAILS THE "BALANCING INTEREST TEST" AS SET FORTH IN THE *UNITED STATES V. CALANDRA* AND *MICHIGAN V. TUCKER* DECI-

SIONS AND THEREFORE SHOULD BE ABOLISHED.

In *United States v. Calandra, supra,* the Supreme Court describes the exclusionary rule by saying: ". . . . The rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ." 414 U.S. at 348. This Court then went on to say that the exclusionary rule does have limitations:

> ". . . the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons. As with any remedial device, the application of the rule has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Id.* at 348.

In other words, the Supreme Court felt that the exclusionary rule, as a remedy, should be used only in those areas where it could serve a useful purpose.

The court in *Calandra* was called to decide whether grand juries could conduct investigations based on evidence obtained from an unlawful search and seizure. The Court said:

> "In deciding whether to extend the exclusionary rule to grand jury proceedings, we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context."

Thus, a balancing test is used to determine if the exclu-

sionary rule is to be used. The injury caused by the rule is weighed against the potential benefits derived from the use of the rule.

In another 1974 case, *Michigan v. Tucker, supra,* the Supreme Court faced the question of whether the testimony of a witness must be excluded simply because his identity was learned when police questioned the defendant without giving him his full Miranda rights. In making their decision the Court again used a balancing test. The Court said:

> "For, *when balancing the interest involved,* we must weigh the strong interest under any system of justice of making available to the trier of fact all concededly relevant and trustworthy evidence which either party seeks to adduce. In this particular case we also 'must consider society's interest in the effective prosecution of criminals. . . . These interests may be outweighed by the need to provide an effective sanction to a constitutional right. . . . but they must in any event be valued." 41 L.Ed.2d at 196-197. (Emphasis added.)

The Court then held that society's interest in prosecuting criminals outweighed the potential benefits of using the exclusionary rule in that case, 41 L.Ed.2d at 197.

In the present case, the fact is, as pointed out above, that the "potential" benefit of the exclusionary rule has never been realized. On the other hand, no one can deny

that the injury caused by the rule is very real, allowing many criminals to escape punishment. Therefore, under the "balancing interest" test developed by the Supreme Court, the exclusionary rule fails and should be abolished.

POINT II

IF THE EXCLUSIONARY RULE IS NOT ABOLISHED, IT SHOULD BE LIMITED SO AS NOT TO EFFECT CASES WHERE IT WILL HAVE LITTLE OR NO DETERRENT EFFECT.

As discussed above, the purpose of the exclusionary rule is to deter unlawful police conduct during investigations in criminal cases. Since a criminal may go free every time the exclusionary rule is used, it seems only logical that the use of the rule should be limited to those situations where there is a very high possibility that it would have a definite deterrent effect. In the remaining cases, where the possibility of deterrence is low or non-existent use of the exclusionary rule should be discontinued. The Supreme Court recognized that there are instances where the exclusionary rule is ineffective. In *Terry v. Ohio, supra,* the Court said: "Moreover, in some contexts the rule is ineffective as a deterrent." 392 U.S. at 13. The Court felt that if the rule is used indiscriminately, serious harm would result:

> " . . . a rigid and unthinking application of the exclusionary rule, in futile protest against

> practices which it can never be used effectively to control, may exact a high toll in human injury and frustration of efforts to prevent crime."

In a very recent decision, the Court concluded that the exclusionary rule should not be used unless it is certain to be effective.

> "Before we penalize police error, therefore, we must consider whether the sanction serves a valid and useful purpose." *Michigan v. Tucker,* 41 L.Ed.2d at 194 (1974).

An example of a situation where the exclusionary rule is ineffective and therefore deterimental is when a police officer acts in good faith but still infringes on some right of a defendant. If the policeman was neither negligent nor malicious then he will feel, and rightly so, that he did the best he could. If the exclusionary rule then requires the suppression of the policeman's work product it will not work as a deterrent to future bad faith but also to future good faith. The frustration spoken of by the Court in *Terry v. Ohio* will be the sole result of the use of the rule. As the Court said in *Michigan v. Tucker*:

> "The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in wilful, or at the very least, negligent conduct which has deprived the defendant of some right . . . Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force." 417 U.S. at 447.

It is respectfully urged that if the exclusionary rule is to be used at all, it only be used in those cases where the violation of a right was either intentional or extremely negligent.

POINT III

THE COURT OF APPEALS' DECISION SHOULD BE REVERSED SINCE THERE WILL BE NO DETERRENT EFFECT IN THIS CASE.

The search and seizure in this case happened five years ago. The legality of the empowering warrant was upheld until four years after the fact. It is completely futile to believe that Officers Pfitter and Swanson, who obtained the search warrant in good faith, will be deterred from doing exactly the same thing again. Besides, error, if any, was not committed by the two police officers. They submitted an affidavit and fully believed that the subsequently issued warrant was valid. Any error committed was by the municipal court judge who issued the warrant. If the Court of Appeals' decision is affirmed the police will be punished for a mistake they did not even make and society will be punished by having a murderer released in their midst. Use of the exclusionary rule in this case would be an exercise in futility. The Court of Appeals' decision should be reversed.

CONCLUSION

It is respectfully urged of this Court that the exclusionary rule be abolished, and if not abolished then limited to those cases where it will have a deterrent effect. The Court of Appeals' decision before this Court should be reversed since the exclusionary rule can accomplish nothing in this case.

Respectfully submitted.

VERNON B. ROMNEY
Attorney General

WILLIAM W. BARRETT
Assistant Attorney General

236 State Capitol
Salt Lake City, Utah 84114

IN THE SUPREME COURT OF THE
UNITED STATES
OCTOBER TERM, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional
Complex,

Appellant,

-vs-

DAVID L. RICE,

Appellee.

CERTIFICATE OF SERVICE

Pursuant to Rule 33 of the United States Supreme Court Rules, 28 U.S.C., the Attorney General of the State of Utah certifies that the following parties at each of the following addresses have been served with the required three copies of the Brief of the Attorney General of the State of Utah, Amicus Curiae: Mr. David L. Herzog, Attorney for Appellee, 1431 First National Center, Omaha, Nebraska 68102; and Mr. Paul L. Douglas, Attorney General of Nebraska, State Capitol, Lincoln, Nebraska 68509; by depositing same in the United States Mail, postage prepaid, this 13th day of August, 1975.

VERNON B. ROMNEY
Attorney General
State of Utah
236 State Capitol
Salt Lake City, Utah 8411[illegible]

FILED
AUG 12 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

NO. 74-1232

CHARLES L. WOLFF, JR., WARDEN,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy
Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

G. THOMAS DAVIS
Senior Assistant
Attorney General

Please address all
communications to:

G. THOMAS DAVIS
132 State Judicial Bldg.
40 Capitol Square, S.W.
Atlanta, Georgia 30334
(404) 656-3353

I N D E X

	Page
OPINIONS BELOW	2
PRELIMINARY STATEMENT	2
QUESTION PRESENTED	2
SUMMARY OF ARGUMENTS	3
ARGUMENTS	
I THE APPLICATION TO THE STATES OF THE EXCLUSIONARY RULE IS NOT CONSTITUTIONALLY REQUIRED; THEREFORE, THE RULE MAY BE ABOLISHED OR MODIFIED	4
II A CHALLENGE TO A STATE COURT CONVICTION ON THE GROUND THAT ILLEGALLY SEIZED EVIDENCE WAS USED TO OBTAIN SUCH CONVICTION SHOULD NOT BE COGNIZABLE UNDER 28 U.S.C. § 2254	14
CONCLUSION	21
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

CASES	PAGE
Andrews v. Swartz, 156 U.S. 272 (1895)	15
Bivens v. Six Unknown Named Agents, 403 U.S. 338 (1971)	7,11
Brown v. Allen, 344 U.S. 443 (1953)	15
Ex Parte Watkins, 3 Pet. 193 (1830)	14
Fay v. Noia, 372 U.S. 391 (1963)	15,16,17
Frank v. Mangum, 237 U.S. 309 (1915)	15
In Re Moran, 203 U.S. 96 (1906)	15
Irvine v. California, 347 U.S. 128 (1954)	7
Kaufman v. United States, 394 U.S. 217 (1969)	11,16,17
Mapp v. Ohio, 367 U.S. 643 367 U.S. 643 (1961)	5,6,8,9, 10,20
Miranda v. Arizona, 384 U.S. 436 (1966)	12
Schneckloth v. Bustamonte, 412 U.S. 218 (1973)	7,14,17,18,20
United States v. Calandra, 414 U.S. 338 (1974)	6
Weeks v. United States, 232 U.S. 383 (1914)	4
Wolf v. Colorado, 338 U.S. 25 (1949)	4,5

OTHERS

28 U.S.C. § 2254(c)	2
A.L.I., Model Code of Pre-Arraignment Procedure, § SS 290.2(2) (Proposed Official Draft No. 1, 1972).	12
Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963)	14
Habeas Corpus, Oaks, Legal History in the High Court - 64 Mich. L. Rev. 451 (1966)	14
Harlan, Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943 (1963)	19

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970) 6

Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C.&P.S. 225 (1961) 7

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

NO. 74-1222

CHARLES L. WOLFF, JR., WARDEN,
Nebraska Penal and Correctional Complex,

Petitioner,

v.

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE STATE OF GEORGIA AS AMICUS CURIAE

OPINIONS BELOW

The respondent in this action was convicted in Nebraska State Court of first degree murder. The conviction was affirmed as reported in 188 Neb. 728, 199 N.W.2d 480 (1972). The federal district court granted habeas relief as reported in 388 F.Supp. 185 (D. Neb. 1974) and affirmed in 513 F.2d 1280 (8th Cir. 1975).

PRELIMINARY STATEMENT

Comes now the State of Georgia, by and through its Attorney General, at the request of the State of Nebraska, and files its brief amicus curiae in the above-styled cause on behalf of petitioner.

Amicus submits that the cause should be reversed for the reasons stated hereinafter.

QUESTIONS PRESENTED

Is there a constitutional requirement that evidence obtained by the State in violation of the Fourth Amendment be excluded from a criminal prosecution?

Is a federal habeas corpus challenge to a State conviction based on evidence obtained by the State in an alleged violation of the Fourth Amendment cognizable under 28 U.S.C. § 2254?

SUMMARY OF ARGUMENTS

This Court has made it clear that deterrence of State violations of the Fourth Amendment is the only constitutional justification for the application to the States of the exclusionary rule. The rule's effectiveness as a deterrent is so highly questionable and its costs so great that it should be abolished in its application to the States. To avoid the appearance that this Court is condoning Fourth Amendment violations, until the States act to find alternatives to the rule, this Court should continue excluding evidence where the constitutional infraction is substantial.

Regardless of the merits of the exclusionary rule, illegal state search and seizure cases should not be cognizable under federal habeas review. This Court has often emphasized that the purpose of habeas review is to prevent punishment of the innocent. Where a Fourth Amendment violation is alleged, the innocence of the prisoner is seldom alleged. State proceedings and the direct review of this Court are sufficient to properly dispose of serious Fourth Amendment issues.

ARGUMENT

At the present time, decisions of this Court require that evidence obtained by the State in violation of the Fourth Amendment not be used in a criminal trial against the defendant and that federal habeas review of State convictions be permitted on the ground of an alleged Fourth Amendment violation by the State. Presented to this Court is the question of the continued validity of these requirements.

I.

In Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914), this Court held that in a federal prosecution the Fourth Amendment barred the use of evidence secured through an illegal search and seizure. In Wolf v. Colorado, 338 U.S. 25, 69 S.Ct. 1359, 93 L.Ed. 1782 (1949), this Court was faced for the first time with the problem of whether the exclusion of evidence secured through an illegal search and seizure applied to the States. This Court held that the Fourth Amendment protection from arbitrary police intrusion on one's privacy applies to the States but "that in a prosecution in a State court for a State crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure." Wolf, 338 U.S. at 33, 69 S.Ct. at 1364.

This Court pointed out that most of the English-speaking world, including a large majority of the States, did not recognize the rule and also that there are other effective means of protecting oppressive police conduct, such as, public opinion and private action. In Mapp v. Ohio, 367 U.S. 643, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961), this Court overruled Wolf by holding that the application of the exclusionary rule to the States is constitutionally mandated. As the dissent made clear, the majority made a sudden, unwarranted break with Wolf.

The main arguments this Court made in Mapp in extending the rule to the States are as follows: Between the time of the Wolf and the Mapp decisions, many States decided to adopt the exclusionary rule, and the federal government reformed the rule. Since the enactment of those reforms, the rule had not caused problems on the federal level. The exclusionary rule is the only effective deterrent preventing arbitrary police intrusion on one's privacy; it is the most important privilege of the Fourth Amendment.

Several of this Court's arguments in Mapp do not appear to be relevant to the issue of whether the extension of the exclusionary rule to the States is constitutionally required. Mapp (dissenting opinion). That a number of States adopted the exclusionary rule between the time of the Wolf and the Mapp

decisions is one example of this proposition. Whether the rule had been reformed or had not created problems on the federal level seems to have little or no bearing on the constitutional question.

The only argument of this Court in Mapp which clearly addressed itself to the constitutional question 1/ is basically this: The Fourth Amendment guarantee of freedom from arbitrary State invasion of one's privacy has but one effective protector, the exclusion of evidence illegally obtained by the police in a state prosecution; this rule is the most important privilege of that amendment. Thus, it appears that this Court is saying the reason the exclusionary rule has reached its constitutional proportions is because without it, Fourth Amendment guarantees are meaningless. It follows from that proposition that if the rule does not in fact protect Fourth Amendment freedoms, or if there are other reliable ways of protecting them, then the rule shrinks from its constitutional dimensions, which required its application to the State.

1/ In United States v. Calandra, 414 U.S. 338, 94 S.Ct. 613, 38 L.Ed.2d 561 (1974), this Court took the position that the sole justification for the exclusionary rule is deterrence of police misconduct.

The arguments against the utilization of the rule are strong. Empirical research indicates that it is a failure as a deterrent. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665 (1970). Oaks concludes that the rule has no effect on the vast majority of police work. There are several reasons for the failure of the rule. There is no direct sanction placed on the officer by the rule, his stake is actually no greater than that of the public. Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (dissenting opinion). Irvine v. California, 347 U.S. 128, 74 S.Ct. 381 (1954). Police lack the time, inclination, and training to understand the complexities of appellate decisions in this area, and the long lapse between the time of the policeman's illegal act and the appellate court's order to release the defendant greatly diminishes any educational effect. Bivens. The rule does not protect innocent victims of illegal police searches. Irvine. The costs of the exclusionary rule are great. Perfectly reliable evidence, which often establishes guilt well beyond a reasonable doubt, is made unavailable to the prosecution. Schneckloth v. Bustamonte, 412 U.S. 218, 93 S.Ct. 2041, 36 L.Ed.2d 854 (1973) (concurring opinion). Society is deprived of a remedy against a wrongdoer, Irvine, supra; the wrongdoer's release encourages him to continue subjecting society to his criminal behavior.

Another great cost of the rule is that public respect for the law is destroyed by the spectacle of criminals escaping punishment because of what often appears to be a mere technicality. Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L.C.&P.S. 225 (1961). In Mapp this Court worried about breeding contempt for the law if the government were allowed to break its own rules; it appears now that the operation of the rule itself may be creating contempt for the law.

An important purpose of punishment in our criminal justice system is to deter illegal behavior. Occasionally, in the course of enforcing the criminal laws, a police officer will violate the Fourth Amendment. In such cases, the government has two important interests to protect. One centers on the original crime, the other on the Fourth Amendment violation. Both acts are illegal, there are laws which proscribe both and demand appropriate punishment. But it is not uncommon for the original crime to be very serious while the Fourth Amendment infraction is insubstantial. 2/

2/ The case sub judice perfectly illustrates this point. The prisoner wantonly murdered a policeman. The police attempted to comply with the Fourth Amendment. Not until federal habeas review was the search warrant found defective.

The State wishes to deter both types of actions, but, of course, has a greater interest in deterring the much more serious infraction. Most certainly under our constitutional system there is a strong need to deter state violations of individual's privacy. However, a means of so doing which may substantially interfere with deterring all other categories of crimes, while not deterring Fourth Amendment infractions, seems alien to sound reasoning. Too often the importance of society's interest in deterrence of violent crimes has been unwarrantedly disregarded because an overzealous policeman has violated Fourth Amendment mandates. It is not inconsistent whatsoever with an upmost respect of constitutional values for a State to wish to deal directly with both the original law breaker and the policeman who subsequently breaks search and seizure commands. In fact, it may be better to deal with both directly. Only by so dealing can action be taken against both that will deter both types of illegal activity. The present rule has the unfortunant consequence of letting both offenders escape.

The majority in Mapp contended that "without that rule the freedom from state invasions of privacy would be [virtually nonexistent]," 367 U.S., at 655, 81 S.Ct. at 1684. In fact, Fourth Amendment violations have rarely been a serious problem in this country. Even if the exclusionary rule had never been adopted,

it is highly unlikely that repressive police action would be other than very rare; while the rule has been ineffective as a deterrent, there are adequate safeguards for our constitutional freedoms. Even assuming for the moment that the rule is a deterrent, all it may reasonably be expected to deter is action wherein the police are seeking evidence to be used in a criminal prosecution. But there is a wide area of police activity which is not aimed at gathering evidence for criminal trials. If the exclusionary rule were the only means of preventing State invasion of privacy, illegal searches and seizures would be rampant. In fact, State and local governments are responsive to their citizens. The political process is fully adequate to prevent illegal police activity from becoming a problem. Furthermore, since the time of Mapp many social changes have been made which assure minorities a strong voice in the political process. Civil rights legislation, greater involvement in the political process on the part of minorities, and change in the attitude of the majority work against police harassment of minorities. Except when a person wants to have perfectly reliable evidence excluded from his criminal prosecution, it is rare that a charge is made of an illegal search and seizure. Where on occasion an illegal search is made of an innocent person, the response from the public and officials has been of outrage, not complacency. The effect of this response on the police is to discourage all illegal activity for fear that the next violation will also involve an innocent person and the consequent public outrage.

Thus, it appears that time has proven the justifications underlying the Mapp opinion to be faulty. Because the exclusionary rule does not in fact protect Fourth Amendment guarantees of freedom from arbitrary State invasions of privacy, the rule loses the justification which was thought to require by constitutional mandate that it be extended to the States. The costs of the rule to society emphasize the need of States to be free to make their own reasoned determinations in this matter.

In his dissenting opinion in Bivens, supra, Mr. Chief Justice Burger worried that a sudden abandonment of the exclusionary rule would be misinterpreted by police to mean that any sort of illegal Fourth Amendment activity on the part of police is now acceptable. Thus, he expressed unwillingness for the Court to abandon the rule, but suggested that creation by legislation of an effective remedy against unlawful conduct by government officials would be an acceptable replacement for it. If it is assumed that the rule is not constitutionally required, but must stand until an acceptable replacement is found, it would appear that there is at least some room for flexibility in its application. Indeed, many federal courts have thought of the rule as "simply a prophylactic device intended generally to deter." See Kaufman v. United States, 394 U.S. 217, at 224, 89 S.Ct. 1068, at 1073, 22 L.Ed.2d 227 (1969).

Where it finds that there is a need to protect certain constitutional values, the Court has shown a willingness to develop rules of exclusion of evidence obtained by a State in violation of those values, rather than to wait for Congress or the States to act. Mapp, supra; Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). In Miranda, the Court set out certain procedural safeguards a State must follow if a defendant's statements are to be allowed in evidence against him. The holding in Mapp does not outline in the same detail as Miranda the precise routine police must follow to prevent exclusion of certain evidence. Rather, by treating "vastly dissimilar cases as if they were the same," Bivens, 403 U.S. at 419, 91 S.Ct. at 2016 (dissenting opinion), the Court excludes all evidence which is obtained through a State infringement of the Fourth Amendment, whether substantial or otherwise. Clearly, the Court could adopt procedures which would discriminate between substantial and minor constitutional infringements. The American Law Institute has drafted a workable procedure which could serve as a model for the Court's formulation of rules in this matter while the States and Congress decide whether to take action. A.L.I., Model Code of Pre-Arraignment Procedure, §§ 290.2(2) (Proposed Official Draft No. 1, 1972).

It provides as follows:

"A motion to suppress evidence shall be granted only if the court finds that the violation upon which it was based was substantial, or if otherwise required by the Constitution of the United States or of this State. In determining whether a violation is substantial the court shall consider all the circumstances including:

"(a) The importance of the particular interest violated;

"(b) The extent of deviation from lawful conduct;

"(c) The extent to which the violation was willful;

"(d) The extent to which privacy was invaded;

"(e) The extent to which exclusion will prevent violation of this Code;

"(f) Whether, but for the violation, the things seized would have been discovered;

"(g) The extent to which the violation prejudiced the moving party's ability to support his motion, or to defend himself in the proceeding in which the things seized are sought to be offered in evidence against him."

It would seem reasonable that evidence obtained where the police in good faith tried to comply with the dictates of probable cause and the warrant requirements need not be excluded. Exclusion of evidence where police have acted in bad faith should be sufficient to remind police that the Fourth Amendment is still viable.

II.

There has been a great deal of development in the law of habeas corpus in the last two decades. The concurring opinion in Schneckloth, supra, relies on the works of two respected scholars in tracing the common law development of habeas corpus. 3/ The common law of habeas corpus at the time of the adoption of the Constitution did not allow a court disposing of a habeas corpus petition to go behind the conviction for any purpose other than to verify the formal jurisdiction of a superior court of general jurisdiction, where a person had been convicted by that court. In Ex Parte Watkins, 3 Pet. 193 (1830), Chief Justice Marshall recognized this principle. Not until the passage of the Habeas Corpus Act in 1867 did federal

---

3/ Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963); Habeas Corpus, Oaks, Legal History in the High Court - 64 Mich. L. Rev. 451 (1966).

habeas review become available to State prisoners, and even this Congress intended to remain within the historical parameters of habeas corpus. Schneckloth.

> "Much, of course, has transpired since that first Habeas Corpus Act. See Fay v. Noia, 372 U.S. at 449-463, 83 S.Ct., at 854-862. (Harlan, J., dissenting). The scope of federal habeas corpus for state prisoners has evolved from a quite limited inquiry into whether the committing state court had jurisdiction, Andrews v. Swartz, 156 U.S. 272, 15 S.Ct. 389, 9 L.Ed. 422 (1895); In re Moran, 203 U.S. 96, 27 S.Ct. 25, 51 L.Ed. 105 (1906), to whether the applicant had been given an adequate opportunity in state court to raise his constitutional claims, Frank v. Mangum, 237 U.S. 309, 35 S.Ct. 582, 59 L.Ed. 969 (1915); and finally to actual redetermination in federal court of state court rulings on a wide variety of constitutional contentions. Brown v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953). No one would now suggest that this Court be imprisoned by every particular of habeas corpus as it existed in the late 18th and 19th centuries. But recognition of that reality does not liberate us from all historical restraint. The historical

> evidence demonstrates that the purposes of the writ, at the time of the adoption of the Constitution, were tempered by a due regard for the finality of the judgment of the committing court. This regard was maintained substantially in tact when Congress, in the Habeas Corpus Act of 1867, first extended federal habeas review to the delicate interrelations of our dual court systems." Id., 412 U.S. at 255-256, 93 S.Ct., at 2062.

In Fay, supra, this Court did away with the rule that a person could not challenge his conviction collaterally even after the Government admitted his innocence. Yet, as Mr. Justice Black in a dissenting opinion stated, "[t]he Court's opinion in Noia shows, from beginning to end, that the defendant's guilt or innocence is at least one of the vital considerations in determining whether collateral relief should be available to a convicted defendant." Kaufman, supra, 394 U.S. at 235-236, 89 S.Ct. at 1079. The concurring opinion in Schneckloth gives some approval to the recent evolution of habeas corpus so long as the person bringing the writ raises a constitutional claim bearing on his innocence.

In Kaufman, supra, this Court granted habeas corpus relief to a prisoner, who admitted his guilt but maintained that he was unjustly detained because evidence used in his trial had been obtained in violation of the Fourth Amendment. As pointed out in its dissent, and the concurring opinion in Schneckloth, this clearly went well beyond any possible justification for the use of habeas relief. Thus, the reasoning which led to extending habeas relief beyond its historical bounds provides no justification for its use to challenge a person's conviction because it was based in part on evidence obtained by an allegedly illegal search and seizure.

A federal court may entertain an application for a writ of habeas corpus from a state prisoner only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a). But as the concurring opinion in Schneckloth indicated, Congress did not intend "every allegation of a constitutional violation to afford an appropriate basis for collateral review," 412 U.S. at 272, 92 S.Ct. at 2070. Fay, supra, acknowledges that the judge has discretion in determining whether law and justice require collateral relief. The innocence of the prisoner is one important factor to weigh in the exercise of this discretion. Kaufman, supra (dissenting opinion).

When there is a claim of an illegal search and seizure, without a claim of innocence, federal habeas review of a state conviction should not be permitted. Schneckloth, supra. (concurring opinion). A catalogue of the values to be protected by refusing review in such cases emphasizes this point. "They include (i) the most effective utilization of limited judicial resourses, (ii) the necessity of finality in criminal trials, (iii) the minimization of friction between our federal and state systems of justice, and (iv) the maintenance of the constitutional balance upon which the doctrine of federalism is founded. Id., 412 U.S., at 259, 93 S.C.t, at 2064.

There is a growing burden of litigation being placed on the federal judicial system. See Schneckloth, 412 U.S. at 260, 93 S.Ct. at 2065, fn. 14. A federal habeas claim has generally been through several state courts, whose judges are as competent to make just decisions as are federal judges. Such unnecessary review overloads the limited resources of the federal courts. Wise judicial administration demands that once Fourth Amendment claims have had a chance to be litigated in state courts and this Court on direct review and state habeas review, they should not be subject to federal collateral attack.

There must be a point at which criminal litigation comes to an end. Our criminal justice system is dedicated to the proposition that an innocent man should not be punished unjustly, and there are numerous safeguards to

ensure this. The present habeas theory seems to be based on two related and erroneous propositions. First, the safeguards of fair trial are generally inadequate to protect the innocent; second,there is always a strong possibility that several tiers of state court have through inadvertance or design allowed an innocent man to be punished. Regardless of the dubious merits of these two propositions, in a habeas claim based on a Fourth Amendment violation, the question of innocence is rarely raised. There is a social need in punishing the guilty for both deterrent and rehabilitative purposes. And the sooner the guilty realizes that the decision is final, the better these purposes may be accomplished. Except in the rare instance that there is a legitimate claim of innocence accompanying a habeas petition based on illegal Fourth Amendment activity, the finality interest calls for denial of habeas review.

This court is the ultimate protector of the Constitution. In its zeal to protect other values, it must not overlook the importance of our system of federalism. In Thoughts at a Dedication: Keeping the Judicial Function in Balance, 49 A.B.A.J. 943 (1963), Mr. Justice Harlan points out that the diffusion of power among the branches of the federal government and the States by the Constitution was done purposefully to ensure that the dangers inherent in too greatly centralized a government would be avoided. Holding an important position within this system is the idea of sovereignty of the States. An exception is that State

Courts are subject to federal review of federal questions. Where there is a possibility that a person has been unjustly convicted and although innocent is being incarcerated because of the misapplication of federal law, there may indeed be strong reasons for habeas review. But where, as with a Fourth Amendment claim, innocence is not alleged, the justification for interfering with a State's sovereignty disappears. "In my view this Court should continue to forbear from fettering the States with an adamant rule which may embarrass them in coping with their own peculiar problems in criminal law enforcement." Mapp, 367 U.S. at 681, 81 S.Ct. at 1706 (Harlan, J., dissenting).

Regardless of the merits of the exclusionary rule on initial trial and appeal, its benefits on collateral review are negligible. Schneckloth, supra (Concurring opinion): its belated application years after the Fourth Amendment violation is void of deterrence. "Serious Fourth Amendment infractions can be dealt with by state judges or by this Court on direct review." Id., 412 U.S. at 269, 93 S.Ct., at 2069. Therefore, there cannot be justification for habeas review where the only ground claimed for release is an illegal search and seizure of evidence used in the trial.

CONCLUSION

For these reasons, Amicus respectfully urges this Court to reverse the holding of the Court of Appeals for the Eighth Circuit in this case.

Respectfully submitted,

ARTHUR K. BOLTON
Attorney General

ROBERT S. STUBBS, II
Chief Deputy
Attorney General

RICHARD L. CHAMBERS
Deputy Attorney General

G. THOMAS DAVIS
Senior Assistant
Attorney General

Please Serve:
G. THOMAS DAVIS

132 State Judicial Bldg.
40 Capitol Square, S. W.
Atlanta, Georgia 30334
(404) 656-3353

CERTIFICATE OF SERVICE

I, G. THOMAS DAVIS, one of the counsel for Amicus Curiae, and a member of the Bar of the Supreme Court of the United States, hereby certify that I served a true and correct copy of the Brief of Amicus Curiae, by depositing same in United States mail, properly addressed with sufficient postage pre-paid, upon the following:

Mel Kammerlohr, Esquire
Assistant Attorney General
State Capitol
Lincoln, Nebraska
Counsel for Petitioner

J. Patrick Green, Esquire
Attorney at Law
405 S. 16th Street
City National Bank Bldg.
Omaha, Nebraska 68102

This 14th day of August, 1975.

S/
G. THOMAS DAVIS

Supreme Court, U. S.
FILED
AUG 20 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF NEW JERSEY AMICUS CURIAE

WILLIAM F. HYLAND,
Attorney General of the State of New Jersey,
Attorney for Amicus Curiae,
State House Annex,
Trenton, New Jersey 08625.

DAVID S. BAIME,
JOHN DECICCO,
DANIEL LOUIS GROSSMAN,
Deputy Attorneys General,
Division of Criminal Justice,
7 Glenwood Avenue,
East Orange, New Jersey 07017,
Of Counsel and on the Brief.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

PAGE

STATEMENT OF INTEREST OF AMICUS—STATE OF NEW JERSEY 1

LEGAL ARGUMENT:

Point I—The Fourth Amendment exclusionary rule should be modified or abrogated in favor of more efficacious remedies 2

A. Introduction 2

B. The Fourth Amendment Exclusionary Rule is a Judge-Made Device Without Basis in Constitutional History And Without Precedential Logic or Rational Effect 4

C. The Exclusionary Rule Has Raised Insurmountable Obstacles To Good Faith Police Performance 13

D. Systemic Integrity is Destroyed by the Exclusionary Rule 17

E. Civil Remedies Are A Satisfactory Alternative To The Fourth Amendment Exclusionary Rule 22

Point II—If this Court declines to abrogate or modify the exclusionary rule, it should nevertheless hold that such issues are not cognizable as of course in federal habeas corpus proceedings 24

PAGE

Point III—Rehabilitation of search warrants issued on less than probable cause is a realistic and balanced approach to cases where the exclusionary rule's purposes have been served by the fact that the officers involved have obtained a warrant prior to the search 28

CONCLUSION 31

Cases Cited

Abel v. United States, 362 U. S. 217 (1959) 10, 16

Adams v. Williams, 407 U. S. 143 (1972) 14

Adamson v. California, 332 U. S. 46 (1947) 12

Agnello v. United States, 269 U. S. 20 (1925) 17

Aguilar v. Texas, 378 U. S. 108 (1964) 17, 29

Air Pollution Variance Board v. Western Alfalfa Corp., 416 U. S. 861 (1974) 9, 15

Alderman v. United States, 394 U. S. 165 (1969) 10

Almeida-Sanchez v. United States, 413 U. S. 266 (1975) 23

Andrews v. Swartz, 156 U. S. 272 (1895) 24

Beck v. Ohio, 379 U. S. 89 (1964) 13

Berger v. New York, 388 U. S. 41 (1967) 9

Bivens v. Six Unknown Narcotics Agents, 403 U. S. 388 (1971) 22

Bower v. United States, —— U. S. ——, 95 S. Ct. 2569 (1975) 23

Boyd v. United States, 116 U. S. 616 (1886) 4, 6-8

Boyer v. Arizona, 455 F. 2d 804 (9 Cir. 1972) 29

Breithaupt v. Abram, 352 U. S. 432 (1957) 20

PAGE

Brinegar v. United States, 338 U. S. 150 (1948) 13, 16

Brown v. United States, 411 U. S. 223 (1973) 10

Byars v. United States, 273 U. S. 28 (1927) 8

Cady v. Dombrowski, 413 U. S. 433 (1973) 14

Camara v. Municipal Court, 387 U. S. 523 (1967) 14

Campbell v. Minnesota, 487 F. 2d 1 (8 Cir. 1973) 29

Cardwell v. Lewis, 417 U. S. 583 (1974) 14

Carroll v. United States, 267 U. S. 132 (1925) 13, 14

Cashen v. Spann, 66 N. J. 541, 334 A. 2d 8 (1975) 22

Chambers v. Maroney, 399 U. S. 51 (1970) 14

Chapman v. California, 386 U. S. 18 (1967) 30

Chapman v. United States, 365 U. S. 610 (1948) 14, 16, 17, 30

Chicago v. Sturges, 222 U. S. 313 (1911) 18

Chimel v. California, 395 U. S. 752 (1969) 13

Clinton v. Virginia, 377 U. S. 158 (1964) 9

Coolidge v. New Hampshire, 403 U. S. 443 (1971) 16, 17

Colonade Catering Corp. v. United States, 397 U. S. 72 (1970) 14

Commonwealth v. Milliken, 450 Pa. 310, 300 A. 2d 78 (1973) 30

Cooper v. California, 386 U. S. 58 (1967) 14

Cupp v. Murphy, 412 U. S. 291 (1974) 15

Davis v. Mississippi, 394 U. S. 721 (1969) 3, 16, 17

Davis v. United States, 328 U. S. 582 (1946) 16

Desist v. United States, 394 U. S. 244 (1969) 3

Draper v. United States, 358 U. S. 307 (1959) 16

PAGE

Elkins v. United States, 364 U. S. 206 (1960)..3, 8-10, 12, 16
Entick v. Carrington, 19 How. St. Tr. 1029 (1765)..... 4
Ex parte Watkins, 28 U. S. (3 Pet.) 193 (1830)..... 24
Fay v. Noia, 372 U. S. 391 (1963).....24, 26
Feldman v. United States, 322 U. S. 487 (1944)..... 8
Frazier v. Cupp, 394 U. S. 731 (1969)..... 12
Fulbright v. United States, 392 F. 2d 432 (10 Cir. 1968) 15
Fuller v. Alaska, 393 U. S. 80 (1969)..... 3
Gambino v. United States, 273 U. S. 310 (1928)..... 8
Gilbert v. California, 385 U. S. 263 (1967)..... 14
Gillespie v. United States, 368 F. 2d 1 (8 Cir. 1966).. 30
Giordanello v. United States, 357 U. S. 480 (1958)..... 17
Go-Bart Importing Co. v. United States, 282 U. S. 344 (1935)..... 13
Goldman v. United States, 316 U. S. 129 (1942)..... 9
Goldstein v. United States, 316 U. S. 114 (1942)..... 10
Gustafson v. Florida, 414 U. S. 260 (1974)..... 14
Harris v. New York, 400 U. S. 222 (1971).....10, 15
Harris v. United States, 331 U. S. 145 (1947)..... 13
Henry v. United Sates, 361 U. S. 98 (1959)..... 15
Hester v. United States, 265 U. S. 57 (1924)..... 15
Huckle v. Money, 95 Eng. Rep. 768 (1763)..... 4
Hurtado v. California, 110 U. S. 516 (1884)..... 12
Irvine v. California, 347 U. S. 28 (1954).....16, 20

PAGE

Johnson v. New Jersey, 384 U. S. 719 (1966)..... 12
Johnson v. United States, 333 U. S. 10 (1948)..... 17
Jones v. United States, 362 U. S. 257 (1960)..... 8, 10
Katz v. United States, 389 U. S. 347 (1967)..... 8, 9
Kaufman v. United States, 394 U. S. 217 (1969)..... 25
Kugler v. Helfant, 421 U. S. 117 (1975)..... 11
Lanza v. New York, 370 U. S. 139 (1962)..... 9
Leach v. Three of the Kings Messengers, 16 How. St. Tr. 1001 (1765)..... 4
Lee v. Florida, 392 U. S. 378 (1968).....3, 9, 16
Linkletter v. Walker, 381 U. S. 618 (1965).....3, 10, 12, 16
Lynch v. Household Finance Corp., 405 U. S. 538 (1972) 22
Mapp v. Ohio, 367 U. S. 643 (1961).....3, 11, 12, 23
Marron v. United States, 275 U. S. 192 (1927)..... 13
McCray v. Illinois, 386 U. S. 300 (1967)..... 13
McDowell v. United States, 383 F. 2d 599 (8 Cir. 1967) 15
Michigan v. Tucker, 417 U. S. 433 (1974)..... 12
Monroe v. Pape, 365 U. S. 167 (1961)..... 22
Moran, In re, 203 U. S. 96 (1906)..... 24
Naples v. Maxwell, 393 F. 2d 615 (6 Cir. 1965)..... 29
Nathanson v. United States, 290 U. S. 41 (1933).....14, 17
New York ex rel. Hatch v. Reardon, 204 U. S. 152 (1907) 10

PAGE

Oklahoma Press Publishing Co. v. Walling, 327 U. S. 186 (1946) 14

Olmstead v. United States, 277 U. S. 438 (1928) 3, 4, 9

On Lee v. United States, 343 U. S. 747 (1955) 9

Oregon v. Hass, —— U. S. ——, 95 S. Ct. 1215 (1975) 30

Osborn v. United States, 385 U. S. 323 (1966) 16

Palko v. Connecticut, 302 U. S. 319 (1937) 12

Patler v. Slayton, 503 F. 2d 472 (4 Cir. 1974) 15

People v. Defore, 242 N. Y. 13, 150 N. E. 585 (1926) .. 4

Perez v. Ledesma, 401 U. S. 82 (1971) 11

Preston v. United States, 376 U. S. 364 (1964) 13

Recznik v. City of Lorain, 393 U. S. 166 (1968) 14, 16

Rios v. United States, 364 U. S. 253 (1960) 13, 15, 16

Rochin v. California, 342 U. S. 165 (1952) 7, 20, 27

Rosencranz v. United States, 356 F. 2d 310 (1 Cir. 1966) 15

Samuels v. Mackell, 401 U. S. 66 (1971) 12

Schmerber v. California, 384 U. S. 757 (1966) 7, 16, 20

Schneckloth v. Bustamonte, 412 U. S. 218 (1973) 3, 16, 24, 25

See v. City of Seattle, 387 U. S. 523 (1967) 14

Shipley v. California, 395 U. S. 818 (1969) 13

Sibron v. New York, 392 U. S. 40 (1968) 14, 16

Silverman v. United States, 365 U. S. 505 (1961) 9

PAGE

Silverthorne Lumber Co. v. United States, 251 U. S. 385 (1920) 10, 14

Simmons v. United States, 390 U. S. 377 (1968) 10

Spinelli v. United States, 393 U. S. 410 (1965) 17

State v. Beal, 40 Wis. 2d 607, 162 N. W. 2d 64 (1968) 30

State v. Bisaccia, 58 N. J. 586, 279 A. 2d 675 (1971) .. 2, 18

State v. Fariello, 133 N. J. Super. 114, —— A. 2d —— (App. Div.) cert. gr. —— N. J. ——, —— A. 2d —— (1975) 30

State v. Funnicello, 60 N. J. 60, 286 A. 2d 55 (1972) .. 25

State v. Misch, 23 Ohio Misc. 47, 260 N. E. 2d 841 (C. Pl. 1970) 30

Stefanelli v. Minard, 342 U. S. 117 (1954) 11

Steffel v. Thompson, 415 U. S. 452 (1974) 11

Stoner v. California, 376 U. S. 483 (1904) 16

Tehan v. United States ex rel. Schott, 382 U. S. 406 (1966) 12

Terry v. Ohio, 392 U. S. 1 (1968) 14, 16

Townsend v. Sain, 372 U. S. 293 (1963) 26

Trupiano v. United States, 334 U. S. 699 (1947) 13

Twining v. New Jersey, 211 U. S. 78 (1908) 12

United States v. Biswell, 406 U. S. 311 (1972) 14

United States v. Brignonti-Ponce, —— U. S. ——, 95 S. Ct. 2574 (1975) 23

United States v. Broon, 473 F. 2d 952 (5 Cir. 1973) .. 15

United States v. Calandra, 414 U. S. 338 (1974) 3, 10

United States v. Capps, 435 F. 2d 136 (9 Cir. 1970) 15

PAGE

United States v. Carmichael, 489 F. 2d 983 (7 Cir. 1973) 29

United States v. Danning, 425 F. 2d 836 (2 Cir. 1969) 29

United States v. Dionisio, 410 U. S. 1 (1973) 14

United States v. DiRe, 332 U. S. 581 (1948) 14, 16

United States v. Harris, 403 U. S. 573 (1971) 16

United States v. Haywood, 464 F. 2d 756 (D. C. Cir. 1972) 15

United States v. Jeffers, 342 U. S. 48 (1951) 10

United States v. Lefkowitz, 285 U. S. 452 (1932) 13

United States v. Lustig, 338 U. S. 74 (1949) 8

United States v. Marihart, 492 F. 2d 897 (8 Cir. 1974) 29

United States v. Nara, 410 U. S. 19 (1973) 14

United States v. Ortiz, —— U. S. ——, 95 S. Ct. 2585 (1975) 23

United States v. Peltier, —— U. S. ——, 95 S. Ct. 2313 (1975) 3, 16

United States v. Rabinowitz, 339 U. S. 56 (1950) 13

United States v. Romano, 330 F. 2d 566 (2 Cir. 1964) 15

United States v. United States District Court, E. D. Mich. S. D. 407 U. S. 297 (1972) 9

United States v. Wallace & Tiernan Co., 336 U. S. 796 (1949) 8, 14

United States v. Whitlong, 339 F. 2d 975 (7 Cir. 1964) 30

PAGE

United States v. Whitmore, 345 F. 2d 28 (6 Cir. 1965) 15

United States v. Ventresca, 380 U. S. 102 (1965) 16, 17, 28

United States ex rel. Gaugler v. Brierley, 477 F. 2d 516 (3 Cir. 1973) 29

United States ex rel. Pugach v. Mancusi, 411 F. 2d 177 (2 Cir.) cert. den. 396 U. S. 889 (1969) 29

U. S. ex rel. Saiken v. Bensinger, 489 F. 2d 865 (7 Cir. 1973) 15

Vale v. Louisiana, 399 U. S. 30 (1970) 13

Walder v. United States, 353 U. S. 62 (1954) 10

Walker v. Birmingham, 388 U. S. 307 (1967) 17

Warden v. Hayden, 387 U. S. 294 (1967) 14

Weeks v. United States, 233 U. S. 343 (1914) 4, 8, 9, 14

Whitely v. Warden, 401 U. S. 560 (1971) 28, 29

Wilkes v. Wood, 19 How. St. Tr. 1153 (1763) 4

Williams v. United States, 401 U. S. 646 (1971) 3, 16

Wolf v. Colorado, 338 U. S. 25 (1949) 11, 16, 20

Wong Sun v. United States, 371 U. S. 471 (1963) 10

Younger v. Harris, 401 U. S. 37 (1971) 11

Zap v. United States, 328 U. S. 624 (1966) 16

United States Constitution Cited

Fourth Amendment 2-4, 6-8, 10, 11, 13, 14, 17, 20-23, 27, 30, 31

Fifth Amendment 7

Fourteenth Amendment 11, 13

PAGE

Statutes Cited

N. J. Stat. Ann.:

Secs. 2A:156A-1 to 26 9

18 U.S.C.:

Secs. 921, 1071 to 1074 17

Secs. 2510-20 9

28 U.S.C.:

Sec. 1343 (3) 22

Sec. 2254 (a) 27

42 U.S.C.:

Sec. 1983 22

Rule Cited

Fed R. Crim. P.:

41 (c) 30

Other Authorities Cited

2 Adams, Works:

523-25 5

A.L.I. Model Code of Pre-Arraignment Procedure, Official Draft No. 1:

Sec. 290.2 (2) 20

Amsterdam, General Perspectives on the Fourth Amendment, 58 Minn. L. Rev. (1974):

349, 378, 456, n. 269 7

386-92 15

394-95 18

PAGE

Amsterdam, "Search and Seizure and Section 2255," 112 U. Pa. L. Rev. (1964):

378 26

Annals of Cong. (June 8, 1789) (remarks of Reps. Gerry and Benson):

754 6

Aptheker, The American Revolution (1960):

Ch. 2 5

Bailyn, The Ideological Origins of the American Revolution (paper ed. 1973):

110-14 4

118 5

Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 Harv. L. Rev. (1963):

441, 466-75 24

Black, Constitutional Law (1893):

435-42 7

3 Blackstone, Commentaries:

*331 25

1 Boorstin, The Americans: The Colonial Experience (Prepared 1958):

345-73 5

PAGE

Burger, "Who Will Watch the Watchmen?" 14 Am. U. L. Rev. (1964):
1 22

Burrett, "Personal Rights, Property Rights and the Fourth Amendment," 1960 Sup. Ct. Rev.:
46, 55 8

13 and 14 Car. II, c. 11, Sec. 5 (1663) 6

Cooley, Constitutional Limitation (1868):
299-308 7

Delinger, "Of Rights and Remedies; The Constitution As a Sword", 85 Harv. L. Rev. (1972):
532 20

Friendly, "Is Innocence Irrelevant? Collateral Attack On Criminal Judgments," 38 U. Chi. L. Rev. (1970):
162 26

Friendly, "The Bill Of Rights As a Code of Criminal Procedure", 53 Calif. L. Rev. (1965):
929, 953 20

Gibbons, "Practical Prophlaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," 3 Seton Hall L. Rev. (1972):
295, 298 3

PAGE

Gray, "The Admissibility of Evidence Illegally Obtained in Scotland," 1966 Judicial Rev.:
89 20

Gutterman, "A Person Aggrieved-Standing to Suppress Illegally Seized Evidence in Transition," 23 Emory L. Rev. (1974):
111 10

16 Hansard, Parliamentary Debates (1765) 6

Hardin, "Other Answers: Search and Seizure, Coerced Confession and Criminal Trial in Scotland, 113 U. Pa. L. Rev. (1964):
165 ..... 20, 21

Kent, 1 Commentaries:
1-*37 7

La Fave, Arrest: The Decision to Take the Suspect Into Custody (1972):
222 4

Lasson, History and Development of the Fourth Amendment to the United States Constitution (1937):
pp. 35-45 4
pp. 44-45, 50-78 5
chs. 1, 2 6
15 7

PAGE

Levin, "An Alternative to The Exclusionary Rule For Fourth Amendment Violation," 55 Judic. (1974):

74-76 20

Levy, Origins of the Fifth Amendment (1968):

325-332 7

Note, "Air Pollution Variance Board v. Western Alfalfa: Constitutional limits on Enforcement of Air Pollution Laws," 5 Environmental L. Rev. (1974):

142 9

Note, "New Jersey Electronic Surveillance Act", 26 Rutgers L. Rev. (1973):

617 9

Note, "Standing to Assert Constitutional Jus Tertii," 88 Harv. L. Rev. (1974):

423 10

Note, "The Exclusionary Rule," 12 Am. Crim. L.:

524-36 21

Note, "The Federal Injunction As A Remedy For Unconstitutional Police Conduct," 75 Yale L. J. (1968):

143 21

Note, "The Fourth Amendment Exclusionary Rule: Past, Present, No Future," 12 Am. Crim. L. Rev. (1975):

507, 510-11 3

PAGE

Note, "Use of Sec. 1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards", 5 Harv. Civ. Rts. L. Rev. (1970):

64 21

Note, "Wiretapping and Electronic Surveillance" (Title III of the Crime Control Act of 1968), 23 Rutgers L. Rev. (1969):

319, 378-79 9

Oaks, "Legal History in the High Court—Habeas Corpus," 64 Mich. L. Rev. (1966):

451-452 24

Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 U. Chi. L. Rev. (1970):

665, 668-72 3

754-57 4

Paulsen, The Exclusionary Rule and Misconduct by the Police, 52 J. Crim. L., C., and P. S. 255 (1961) 8

Pollak, "Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ," 66 Yale L. J. (1960):

50, 65 24

Quincy, Reports (App. I) (1865):

395-450 5

Reitz, "Federal Habeas Corpus: Post Conviction Remedy for State Prisoners," 108 U. Pa. L. Rev. (1960):

461, 497 24

PAGE

Schrock and Welsh, "Up from Calandra." "The Exclusionary Rule as a Constitutional Requirement," 59 Minn. L. Rev. (1974):

251 7

Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 Yale L. J. (1962):

559 10

Skolnick, Justice Without Trial (1967):

pp. 215-28 4

Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 J. Legal Studies (1973):

243, 275-78 4

255-259 18

Sydnor, American Revolutionaries In the Making (Free Press Ed. 1967):

107-18 23

Taylor, Two Studies in Constitutional Interpretation (1969) 7

The Era of the American Revolution (Morris ed., 1939) (Dickerson, "Writs of Assistance as a Cause of Revolution"):

40-75 6

2 Tocqueville, Democracy in America (Vintage Ed. 1945):

99-130 23

PAGE

3 Wigmore, Evidence (3d ed. 1940):

291-308, Secs. 817 to 820d 7

Wright, "Must the Criminal Go Free If the Constable Banders?" 50 Texas L. Rev. (1972):

736, 741-45 20

Zuckerman, Peaceable Kingdoms (1970) 23

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE STATE OF NEW JERSEY AMICUS CURIAE

Statement of Interest of *Amicus*—State of New Jersey

The significant issue raised in this case is whether the exclusionary rule should be modified to admit rele-

vant and competent evidence where the police have acted in good faith in exigent circumstances and application of the rule would serve no valid purpose. Also at issue here is whether a search warrant, which is deficient on its face, may be cured by adducing additional evidence at the suppression hearing to prove that the police in fact had probable cause to obtain the warrant. These questions are of direct and substantial interest to the Attorney General of the State of New Jersey. As the chief law enforcement officer of New Jersey, the Attorney General is concerned with maintaining an equitable balance between law enforcement to protect society against crime and the observation of procedural due process in the administration of criminal justice. In the context of this case, we submit that this balance is best achieved by abrogating the exclusionary rule at least with respect to federal habeas corpus proceedings.

LEGAL ARGUMENT

POINT I

The Fourth Amendment exclusionary rule should be modified or abrogated in favor of more efficacious remedies.

A. Introduction

The exclusionary rule exacts inestimable social cost. Successful motions to suppress eliminate reliable, competent, and relevant evidence. False verdicts result. Truth suffers as notions of "reasonableness" change. Since "truth and justice are inseparable,"[1] justice diminishes

[1] *State* v. *Bisaccia*, 58 N. J. 586, 598, 279 A. 2d 675, 676 (1971).

when relevant evidence is suppressed. The validity of the adversarial system as a means to ascertain truth is demeaned. Loss of public confidence is inevitable. No legal principle which is not constitutionally compelled should reign when its consequences are so harsh. This Court has never held that the Fourth Amendment absolutely requires exclusion of evidence obtained through unreasonable searches and seizures. Clearly, therefore the exclusionary rule is not of constitutional dimension. Rather, this Court has justified application of the rule by relying on an assumption that it deters police misconduct,[2] although several decisions also express concern that judicial integrity might be sullied by use of evidence obtained in violation of the Fourth Amendment.[3] Recent empirical studies indicate that the exclusionary rule does

[2] See, *e.g.*, *United States* v. *Peltier*, —— U. S. ——, 95 S. Ct. 2313, 2316 (1975); *United States* v. *Calandra*, 414 U. S. 338, 343 (1974); *Schneckloth* v. *Bustamonte*, 412 U. S. 218, 231-32 (1973); *Williams* v. *United States*, 401 U. S. 646, 654-55 (1971); *Davis* v. *Mississippi*, 394 U. S. 721, 723 (1969); *Desist* v. *United States*, 394 U. S. 244, 246 (1969); *Fuller* v. *Alaska*, 393 U. S. 80, 81 (1969); *Lee* v. *Florida*, 392 U. S. 378, 381 (1968); *Linkletter* v. *Walker*, 381 U. S. 618 635-37 (1965). See also *e.g.*, Gibbons, "Practical Prophlaxis and Appellate Methodology: the Exclusionary Rule as a Case Study in the Decisional Process," 3 *Seton Hall L. Rev.* 295, 298 (1972); Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 *U. Chi. L. Rev.* 665, 668-72 (1970).

[3] See, *e.g.*, *United States* v. *Peltier*, *supra*, 95 S. Ct. at 2317; *Linkletter* v. *Walker*, *supra*, 381 U. S. at 638; *Mapp* v. *Ohio*, 367 U. S. 643, 659 (1961); *Elkins* v. *United States*, 364 U. S. 206, 223 (1960); *Olmstead* v. *United States*, 277 U. S. 438, 483-84 (1928), (Brandeis, J., dissenting). See also, *e.g.*, Note, "The Fourth Amendment Exclusionary Rule: Past, Present, No Future," 12 *Am. Crim. L. Rev.* 507, 510-11 (1975).

not serve to further either of these goals.[4] Consequently, the rule should be abrogated or modified in favor of a more effective remedy which balances the rights of individuals with those of the general citizenry.

B. The Fourth Amendment Exclusionary Rule is a Judge-Made Device Without Basis in Constitutional History And Without Precedential Logic or Rational Effect.

At common law, courts declined to examine the method by which evidence was obtained.[5] Evidence was judged for competence, materiality, and relevance, not for the manner on which it was obtained.[6] Moreover, the modern law of searches and seizures dates only to the Eighteenth Century. As this Court has noted,[7] John Wilkes' case and its contemporary companions mark the initial judicial recognition of a right to be free from unreasonable searches and seizures.[8]

---

[4] Oaks, *supra*, 37 *U. Chi. L. Rev.* at 754-57; Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives," 2 *J. Legal Studies* 243, 275-78 (1973). See also, *e.g.*, La Fave, *Arrest: The Decision to Take the Suspect Into Custody*, (1972), at 222; Skolnick, *Justice Without Trial*, (1967) at pp. 215-28.

[5] *E.g.*, *Olmstead* v. *United States*, *supra*; *Weeks* v. *United States*, 233 U. S. 343 (1914); *Boyd* v. *United States*, 116 U. S. 616 (1886); See, *e.g.*, *People* v. *Defore*, 242 N. Y. 13, 150 N. E. 585 (1926).

[6] *Id.*

[7] *E.g.*, *Boyd* v. *United States*, *supra*.

[8] *Leach* v. *Three of the Kings Messengers*, 16 *How. St. Tr.* 1001 (1765); *Entick* v. *Carrington*, 19 *How. St. Tr.* 1029 (1765); *Huckle* v. *Money*, 95 *Eng. Rep.* 768 (1763); *Wilkes* v. *Wood*, 19 *How. St. Tr.* 1153 (1763). See generally Lasson, *History and Development of the Fourth Amendment to the United States Constitution* (1937) pp. 35-45. See also Bailyn, *The Ideological Origins of the American Revolution* (paper ed. 1973) at 110-14.

Wilkes, of course, anonymously published the anti-Ministry *North Briton*. Lord Halifax, then Prime Minister, issued general warrants to four royal messengers to discover the identity of the publisher.[9] They eventually discovered Wilkes' role and ransacked his house, seizing various items. Wilkes was imprisoned in the Tower for seditious libel.[10] He, and others at his urging, sued the messengers in trespass and recovered.[11] On appeal, Lord Camden upheld the damage verdicts. These decisions, although critical of general warrants, intimate no right to exclusion of evidence. Wilkes himself was freed, not by asserting his rights in a criminal defense, but by claiming Parliamentary privilege in habeas corpus.[12] Nothing in this seminal period suggests that exclusion could substitute for trespass.

Much of the early American resentment against unreasonable searches and seizures emanates from royal officials' increasing reliance on general warrants and writs of assistance to enforce unpopular Parliamentary regulations of colonial trade.[13] It was against these executive warrants that James Otis so eloquently orated.[14]

---

[9] Lasson, *supra*, at pp. 44-45.

[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] *Id.* at 50-78. See also, *e.g.*, Aptheker, *The American Revolution* (1960) at Ch. 2; Bailyn, *supra*, at 118; 1 Boorstin, *The Americans: The Colonial Experience* (Prepared 1958) at 345-73; Few modern works though, catch the spirit of the times as well as John Dickinson's Letters from a Farmer in Pennsylvania.

[14] 2 Adams, *Works* 523-25; 10 *Id. passim*; Quincy, *Reports*, 395-540 (App. I) (1865)

The opposition, though, focused on royal abuses and not on local law enforcement.

It is historically obvious that general warrants and writs of assistance were the continued focus of American restrictions on national government. Prohibitions against such devices were contained in the body of the Constitution, while the express freedom from unreasonable searches and seizures was appended thereafter.[15] Again, the concern was directed at national and not local government. For example, New Jersey's original 1776 Constitution contained no similar guarantee.[16] These matters, after Parliamentary repeal of the general warrant statutes,[17] were hardly of vital concern. Taxes and other significant oppressive measures, not searches, directly sparked the Revolution.[18] Moreover, notions of evidentiary exclusion are utterly absent from early constitutional history.

Indeed, almost a century passed from ratification of the Constitution until this Court decided that exclusion of evidence might be used as a remedy for governmental illegality. *Boyd* v. *United States,* 116 U. S. 616 (1886). Furthermore, *Boyd* created the remedy only by com-

[15] *U. S. Const.,* Amend IV. See Annals of Cong. 754 *et seq.* (June 8, 1789) (remarks of Reps. Gerry and Benson).

[16] No such prohibition appeared until the 1844 New Jersey Constitution was promulgated.

[17] 13 and 14 *Car.* II, c. 11, §5 (1663); See 16 Hansard, Parliamentary Debates (1765). See generally Lasson, *supra,* chs, 1, 2. But see Morris, ed., The Era of the American Revolution (1939) at 40-75 (Dickerson, "Writs of Assistance as a Cause of Revolution").

[18] See sources cited note 13, *supra.*

mingling the foundations of the Fourth with those of the Fifth Amendment. See 116 U. S. at 621, 630-33. In fact, the case involved neither a search nor a seizure. Rather, it concerned a customs statute which sanctioned non-production of documents by confession of the government's allegations. *Id.* at 620. Only Justice Miller, joined by Chief Justice Waite, protested Justice Bradley's imperfect analysis. *Id.* at 638-41. Subsequent historical scholarship has validated Justice Miller's concurring opinion, demonstrating that the Fourth and Fifth Amendments derive from separate and distinct sources and are directed at different official evils.[19] Nevertheless, this Court has occasionally reverted to such dualistic analysis to apply the exclusionary rule. *E.g., Schmerber* v. *California,* 384 U. S. 757, 767 (1966); *Rochin* v. *California,* 342 U. S. 165 (1952). Yet, no decision holds that the Fourth Amendment *alone* requires exclusion of evidence. As previously noted, the exclusionary rule is entirely a judicially fashioned device not of constitutional stature. Only by compounding *Boyd's* fallacious conception of the relationship between the Fourth and Fifth Amendments can the exclusionary rule even be said to be constitutionaly derived, though not required.

[19] See Lasson, *supra,* at 15 et seq.; Taylor, *Two Studies in Constitutional Interpretation* (1969); 3 Wigmore, *Evidence* (3d ed. 1940), §§817 to 820d at 291-308. See also Amsterdam, *General Perspectives on the Fourth Amendment,* 58 *Minn. L. Rev.* 349, 378, 456 at n. 269 (1974). *Contra,* Schrock and Welsh, "Up from Calandra." "The Exclusionary Rule as a Constitutional Requirement," 59 *Minn. L. Rev.* 251 (1974). See Levy, *Origins of the Fifth Amendment* (1968), 325-332. For older commentary, See Black, Constitutional Law 435-42 (1893); Cooley, Constitutional Limitation 299-308 (1868); Chancellor Kent however failed to mention any such freedoms. See Kent, 1 Commentaries 1-*37.

In fact, *Boyd's* faulty reasoning was the precise basis of the rule's eventual promulgation. *Weeks* v. *United States,* 232 U. S. 383 (1916). *Weeks* relied heavily on *Boyd* for its conclusion that an excision of evidence on Fourth Amendment grounds could ever be proper. 232 U. S. at 386-88. Moreover, much of the *Weeks* decision relates to conceptions of warrantless searches, seizures, and arrests which are now obsolete.[20] Additionally, the focus of the decision is delineated in terms of the evils of proprietary dispossession. See 232 U. S. at 393-98. These property concepts have been abandoned to a great extent. See, *e.g., Katz* v. *United States,* 389 U. S. 347 (1967); *Jones* v. *United States,* 362 U. S. 257 (1960). Clearly, an analysis which contemplates total appropriation of property without due process is logically irrelevant to situations where property is taken solely for evidentiary purposes. This type of analysis further beclouded the exclusionary rule's foundation. So here, too, is another flaw in the rule's predicate. Its only precedential and historical bases are obviously undifferentiated mixtures of the law of other Amendments. The rule's only real justification, now discredited, was prophylaxis against police conduct.[21]

---

[20] Compare 232 U. S. at 389 with *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 796, 796-97 (1949).

[21] See, *e.g., Elkins* v. *United States,* 364 U. S. 206, 208 (1960) (end of "silver platter" doctrine); *United States* v. *Lustig,* 338 U. S. 74, 79 (1949); *Feldman* v. *United States,* 322 U. S. 487, 492 (1944); *Gambino* v. *United States,* 273 U. S. 310 (1928); *Byars* v. *United States,* 273 U. S. 28 (1927). See generally, *e.g.,* Burrett, *"Personal Rights, Property Rights and the Fourth Amendment,"* 1960 *Sup. Ct. Rev.* 46, 55; Paulsen, *The Exclusionary Rule and Misconduct By the Police,* 52 *J. Crim. L., C., and P. S.* 255 (1961).

Subsequent to *Weeks,* the Court continued to allow evidence illegally seized by state officials to be used in federal courts,[22] and by federal officers in state courts.[23] A constitutional right to exclusion would have required exclusion under either circumstances. When the situations were finally "rectified", deterrence of official misconduct and systemic integrity once more were the rationales.[24]

Likewise, adherence to property concepts, not fully disavowed until *Katz, supra,*[25] created a maze of decisions concerning electronic surveillance.[26] That problem was not fully solved by court decisions, and a proliferation of state and federal statutes was necessary to bring order to the area.[27] The same proprietary concepts have also

---

[22] See *Elkins* v. *United States, supra.*

[23] *Id.*

[24] *Id.*

[25] But see *Air Pollution Variance Board* v. *Western Alfalfa Corp.,* 416 U. S. 861 (1974); discussed in Note, *"Air Pollution Variance Board* v. *Western Alfalfa:* Constitutional limits on Enforcement of Air Pollution Laws," 5 *Environmental L. Rev.* 142 (1974).

[26] *E.g., Lee* v. *Florida,* 392 U. S. 378 (1968); *Berger* v. *New York,* 388 U. S. 41 (1967); *Lanza* v. *New York,* 370 U. S. 139 (1962); *Clinton* v. *Virginia,* 377 U.S. 158 (1964); *Silverman* v. *United States,* 365 U. S. 505 (1961); *On Lee* v. *United States,* 343 U. S. 747 (1955); *Goldman* v. *United States,* 316 U. S. 129 (1942); *Olmstead* v. *United States, supra.*

[27] 18 U.S.C. §§2510-20; *E.g., N. J. Stat. Ann.* Secs. 2A:156A-1 to 26. See generally, *e.g.,* Note, *"New Jersey Electronic Surveillance Act", 26 Rutgers L. Rev.* 617 (1973); Note, *"Wiretapping and Electronic Surveillance"* (Title III of the Crime Control Act of 1968), 23 *Rutgers L. Rev.* 319, 378-79 (1969). See also *United States* v. *United States District Court,* E. D. Mich. S. D. 407 U. S. 297 (1972).

produced an incredibly confused body of "standing" law, which remains unsettled.[28] Many of these decisions seem to be more result-oriented than a staunch commitment to the exclusionary rule otherwise might demand.[29] If evidence is obtained through official insolence, judicial integrity is stained whether the evidence is used against the conduct's victim or against another.[30] Moreover, illegally seized evidence may be used to impeach the credibility of a defendant.[31] Again, the integrity of the system theoretically suffers. The only principle that could justify this latter anomaly is that two wrongs do make

---

[28] See, *e.g.*, *Brown* v. *United States*, 411 U. S. 223 (1973); *Alderman* v. *United States*, 394 U. S. 165, (1969); *Simmons* v. *United States*, 390 U. S. 377 (1968); *Wong Sun* v. *United States*, 371 U. S. 471 (1963); *Jones* v. *United States*, 362 U. S. 257 (1960); *United States* v. *Jeffers*, 342 U. S. 48 (1951); *Goldstein* v. *United States*, 316 U. S. 114 (1942); *New York ex rel. Hatch* v. *Reardon*, 204 U. S. 152 (1907). See generally, *e.g.*, Gutterman, "A Person Aggrieved-Standing to Suppress Illegally Seized Evidence in Transition," 23 *Emory L. Rev.* 111 (1974). See also Sedler, "Standing to Assert Constitutional Jus Tertii in the Supreme Court," 71 *Yale L. J.* 559 (1962); Note, "Standing to Assert Constitutional Jus Tertii," 88 *Harv. L. Rev.* 423 (1974).

[29] *E.g.* Compare *Silverthorne Lumber Co.* v. *United States*, 251 U. S. 385, 391-92 (1920) with cases cited Note 28 *supra*. It should be noted that Alderman, *supra*, involved a "national security" type fact pattern. *Cf. Abel* v. *United States*, 362 U. S. 217 (1959).

[30] *Silverthorne Lumber Co.* v. *United States*, *supra*. See *Linkletter* v. *Walker*, *supra*; *Elkins* v. *United States*, *supra*. Of course the same might be true of other constitutional rights, but the concern here is only the Fourth Amendment.

[31] *United States* v. *Calandra*, 414 U. S. 338 (1974); *Harris* v. *New York*, 400 U. S. 222 (1971); *Walder* v. *United States*, 353 U. S. 62 (1954).

a right. Consequently, diminution of the judicial integrity justification is evident from court decisions. There is no need for reference to empirical studies in this respect. Regardless, the lack of any cohesive approach to the rule is a clear expression of this Court's own doubts of exclusion as a viable remedy.

Furthermore, for almost fifty years this Court recognized that different problems confront state and federal law enforcement officials. The Court initially refused to force the states to apply the exclusionary rule even though it found the Fourth Amendment enforceable through the due process clause of the Fourteenth. *Wolf* v. *Colorado*, 338 U. S. 25 (1949). The Court also forbade federal courts to intervene in state proceedings to suppress evidence. *Stefanelli* v. *Minard*, 342 U. S. 117, 120 (1954). That prohibition still controls. *Cf.*, *Kugler* v. *Helfant*, 421 U. S. 117 (1975).[32]

Each of these decisions emphasizes the non-Constitutional nature of the rule. Only when the Court foisted the rule upon the States did it deem the remedy a Constitutional requirement of any sort. *Mapp* v. *Ohio*, 367 U. S. 643, 657 (1961). Even so, the Court did not establish the rule as derived solely from the Fourth Amendment. Rather, the Court found it to derive from the due process clause of the Fourteenth Amendment. 367 U. S. at 656-57. Further, even in *Mapp* the Court seemed to recognize that exclusion was nothing more than a rule of evidence. 367 U. S. at 648-49. *Mapp* thus departed from long accepted notions of the rule's function and nature. Of course,

---

[32] If comity constraints are applicable in these types of cases, then surely they should support overruling at least of *Mapp* v. *Ohio*, *Cf.*, *e.g.*, *Steffel* v. *Thompson*, 415 U. S. 452 (1974). *Perez* v. *Ledesma*, 401 U. S. 82 (1971); *Samuels* v. *Mackel*, 401 U. S. 66 (1971); *Younger* v. *Harris*, 401 U. S. 37 (1971).

for the Court to have found the rule binding on the States, it necessarily established a constitutional basis therefor.[33] The radical departure from earlier case law is easily explained by the result. The ends seem to have been perceived to have justified the means. Otherwise, *Mapp* is a logical travesty which ignores the fallacies of its predecessors and which uses earlier cases to reach a result which in no way follows from the precedents. See 367 U. S. 657 at n. 8. Regardless, the case did not actually establish either a right to exclusion or elevate the exclusionary rule itself to constitutional stature. In fact, the constitutional basis of the rule is the right to be free from unreasonable searches and seizures, while the rule itself has been denominated as the "only effective way" to implement that right. 367 U. S. at 656 citing *Elkins* v. *United States,* 364 U. S. 206, 217 (1960). This assumption was unsupported then and is now discredited. The rule is neither effective nor does it implement the right. Moreover, this somewhat blithe assertion effected unnecessary disequilibrium in the relationship between the states and the federal government.[34]

However, the Court declined to apply the rule retroactively. *Linkletter* v. *Walker,* 381 U. S. 618 (1965). Consequently, its stature as a Constitutional remedy once more became questionable.[35] *Mapp,* then, is the only con-

---

[33] See, *e.g., Adamson* v. *California,* 332 U. S. 46 (1947); *Palko* v. *Connecticut,* 302 U. S. 319 (1937); *Twining* v. *New Jersey,* 211 U. S. 78 (1908); *Hurtado* v. *California,* 110 U. S. 516 (1884).

[34] See note 32 *supra* and accompanying text.

[35] Compare, *e.g., Michigan* v. *Tucker,* 417 U. S. 433 (1974); *Frazier* v. *Cupp,* 394 U. S. 731 (1969); *Johnson* v. *New Jersey,* 384 U. S. 719 (1966); *Tehan* v. *United States ex rel. Schott,* 382 U. S. 406 (1966).

temporary case which recognizes a constitutional basis for the exclusionary rule, stemming as much from the Fourteenth Amendment due process clause as from the Fourth Amendment.

C. The Exclusionary Rule Has Raised Insurmountable Obstacles To Good Faith Police Performance.

Concomitant with the foregoing procedural oddities attendent to the exclusionary rule is its substantive confusion. All warrantless searches are *per se* unreasonable except those within "well" delineated exceptions. Those exceptions, though, are fast devouring the rule. For example, searches incident to lawful arrests have always been legal, but their scope has widened and narrowed so frequently and so drastically that no policeman could realistically either rely on or be deterred by judicial expositions.[36] Likewise, the law relevant to the permissible scope of automobile searches may possibly permit searches of vehicles if the officer could arrest the occupants for traffic violations, even if he does not arrest them, and even if he

---

[36] *E.g., Vale* v. *Louisiana,* 399 U. S. 30 (1970); *Shipley* v. *California,* 395 U. S. 818 (1969); *Chimel* v. *California,* 395 U. S. 752 (1969); *McCray* v. *Illinois,* 386 U. S. 300 (1967); *Beck* v. *Ohio,* 379 U. S. 89 (1964); *Preston* v. *United States,* 376 U. S. 364 (1964); *Rios* v. *United States,* 364 U. S. 253 (1960); *United States* v. *Rabinowitz,* 339 U. S. 56 (1950); *Brinegar* v. *United States,* 338 U. S. 150 (1948); *Trupiano* v. *United States,* 334 U. S. 699 (1947); *Harris* v. *United States,* 331 U. S. 145 (1947); *United States* v. *Lefkowitz,* 285 U. S. 452 (1932); *Go-Bart Importing Co.* v. *United States,* 282 U. S. 344 (1935); *Marron* v. *United States* 275 U. S. 192 (1927); *Carroll* v. *United States,* 267 U. S. 132 (1925).

is unaware that he might.[37] Warrantless searches in "exigent circumstances" are also permitted, but appellate courts' changing notions of emergency cannot be said to comport with those of a working policeman in increasing fear for his safety.[38] The permissibility of warrantless administrative searches has also fluctuated.[39]

Moreover, there is a whole range of police conduct which the Fourth Amendment, and thus the exclusionary rule, does not reach. This conduct is termed "investigative detention" which may be accompanied by a "non-search" pat-down.[40] Between this conduct and the arrest

---

[37] *E.g., Cardwell* v. *Lewis,* 417 U. S. 583 (1974); *Gustafson* v. *Florida,* 414 U. S. 260 (1974); *Cady* v. *Dombrowski,* 413 U. S. 433 (1973); *Chambers* v. *Maroney,* 399 U. S. 51 (1970); *Cooper* v. *California,* 386 U. S. 58 (1967); *United States* v. *DiRe,* 332 U. S. 581 (1948); *Carroll* v. *United States,* 267 U. S. 132 (1925); See *Weeks, supra.*

[38] *E.g., Warden* v. *Hayden,* 387 U. S. 294 (1967); *Chapman* v. *United States,* 365 U. S. 610 (1948). See also *Gilbert* v. *California,* 385 U. S. 263, 269 (1967) ("hot pursuit").

[39] *E.g., United States* v. *Biswell,* 406 U. S. 311 (1972); *Colonade Catering Corp.* v. *United States,* 397 U. S. 72 (1970); *Camara* v. *Municipal Court,* 387 U. S. 523 (1967); *See* v. *City of Seattle,* 387 U. S. 523 (1967); See *United States* v. *Wallace & Tiernan Co.,* 336 U. S. 793 (1949); *Oklahoma Press Publishing Co.* v. *Walling,* 327 U. S. 186 (1946); See also *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Silverthorne Lumber Co.* v. *United States, supra.*

[40] *E.g., Adams* v. *Williams,* 407 U. S. 143 (1972); *Recznick* v. *City of Lorain,* 393 U. S. 166 (1968); *Sibron* v. *New York,* 392 U. S. 40 (1968); *Terry* v. *Ohio,* 392 U. S. 1 (1968). Likewise, a man's voice and his handwriting samples are not subjects of "seizures" when he is compelled to "present" either to a grand jury. *United States* v. *Nara,* 410 U. S. 19 (1973) (handwriting); *United States* v. *Dionisio,* 410 U. S. 1 (1973) (voice).

or exigent exceptions lies the *de facto* arrest, which may permit a warrantless search.[41] It is difficult for Constitutional scholars as well as policemen to definitively label any given law enforcement procedure within this range.[42] Surely a policeman would be hard pressed to explain the precise nature of his conduct in terms of the foregoing framework.

This Court has also attempted to delineate other forms of non-search conduct. Items in "plain view" are not the subject of searches.[43] Likewise, trespass *ab initio* in the "open fields" will not vitiate admission into evidence of objects seized as the result of observations made.[44] Nor are abandoned objects, *"bona vacantia,"* the subject of

---

[41] *E.g., Cupp* v. *Murphy,* 412 U. S. 291 (1974); *Rios* v. *United States,* 364 U. S. 253 (1960); *Henry* v. *United States,* 361 U. S. 98 (1959).

[42] See generally, Amsterdam, *supra,* 58 *Minn. L. Rev.* at 386-92.

[43] *E.g., Harris* v. *New York,* 390 U. S. 234, 236 (1967).

[44] *E.g., Air Pollution Variance Board* v. *Western Alfalfa Corp., supra. Hester* v. *United States,* 265 U. S. 57 (1924). Yet, some courts have found that there is a difference between "open fields" and "curtilage", creating even more confusion. See, *e.g., Patler* v. *Slayton,* 503 F. 2d 472 (4 Cir. 1974); *U. S. ex rel. Saiken* v. *Bensinger,* 489 F. 2d 865 (7 Cir. 1973); *United States* v. *Broon,* 473 F. 2d 952 (5 Cir. 1973); *United States* v. *Haywood,* 464 F. 2d 756 (D. C. Cir. 1972); *United States* v. *Capps,* 435 F. 2d 136 (9 Cir. 1970); *Fulbright* v. *United States,* 392 F. 2d 432 (10 Cir. 1968); *McDowell* v. *United States,* 383 F. 2d 599 (8 Cir. 1967); *Roseneranz* v. *United States,* 356 F. 2d 310 (1 Cir. 1966); *United States* v. *Whitmore,* 345 F. 2d 28 (6 Cir. 1965); *United States* v. *Romano,* 330 F. 2d 566 (2 Cir. 1964).

either search or seizure.[45] Consent searches have also undergone incredible permutations.[46]

Most importantly, and most frequently, underlying notions of probable cause have changed.[47] The Court often substitutes a syllogism for a policeman's initiative actions based on his expertise. Yet, the Court has never recognized that to some extent, an on-the-spot determination of probable cause is as much an expert opinion as testimony given concerning an autopsy. Once more, the concepts change so rapidly and so drastically that police reliance, by necessity, must be *de minimis*. Court decisions must be said to foster as much misconduct as they deter.[48] In any case, much of the "misconduct" is deemed so only *ex post facto* and as the result of doctrinal change.[49]

---

[45] *Abel* v. *United States, supra.*

[46] *E.g., Schneckloth* v. *Bustamonte, supra; Lee* v. *Florida, supra; Osborn* v. *United States,* 385 U. S. 323 (1966); *Stoner* v. *California,* 376 U. S. 483 (1904); *Chapman* v. *United States,* 365 U. S. 610 (1961); *United States* v. *DiRe,* 332 U. S. 581 (1948); *Zap* v. *United States,* 328 U. S. 624 (1966); *Davis* v. *United States,* 328 U. S. 582 (1946).

[47] See, *e.g., Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971); *United States* v. *Harris,* 403 U. S. 573 (1971); *Davis* v. *Mississippi,* 394 U. S. 721 (1969); *Recznik* v. *City of Lorain, supra; Sibron* v. *New York, supra; Terry* v. *Ohio, supra; United States* v. *Ventresca,* 380 U. S. 102 (1965); *Rios* v. *United States, supra; Draper* v. *United States,* 358 U. S. 307(1959); *Brinegar* v. *United States, supra.*

[48] See, *e.g., Oaks, supra; Spiotto, supra.*

[49] See, *e.g., United States* v. *Peltier, supra; Williams* v. *United States,* 401 U. S. 646 (1971); *Schmerber* v. *California,* 384 U. S. 757 (1966); *Linkletter* v. *Walker, supra; Elkins* v. *United States, supra; Irvine* v. *California,* 347 U. S. 128 (1954); *Wolf* v. *Colorado, supra.*

Although the requirements for obtaining warrants has remained relatively constant,[50] these criteria have changed with sufficient frequency to obscure requirements concerning informant reliability and factual basis.[51] Again, police confusion is the only discernible result. The proliferation of doctrines concerning the Fourth Amendment, which in no way can be said to realistically affect routine police performance also perverts judicial integrity.

D. Systemic Integrity is Destroyed by the Exclusionary Rule.

There is no right to break the law.[52] Nor is there a right to avoid detection.[53] The Fourth Amendment exclusionary rule contravenes both of these basic tenents. In effect, it tends at least to establish a right to avoid detection. This is an incentive to break the law. So, rather than being an extraordinary remedy of infrequent use, the exclusionary rule has fostered crime. Criminals, especially recidivists, appear to be well aware that any criminal activity, even when discovered, may well go unpun-

---

[50] See, *e.g., Coolidge* v. *New Hampshire, supra; Davis* v. *Mississippi, supra; Spinelli* v. *United States,* 393 U. S. 410 (1965); *Aguilar* v. *Texas,* 378 U. S. 108 (1964); *Chapman* v. *United States, supra; Giordanello* v. *United States,* 357 U. S. 480 (1958); *Johnson* v. *United States,* 333 U. S. 10 (1948); *Nathanson* v. *United States,* 290 U. S. 41 (1933); *Agnello* v. *United States,* 269 U. S. 20 (1925).

[51] See, *e.g., Spinelli* v. *United States, supra; United States* v. *Ventresca, supra; Aguilar* v. *Texas, supra; Nathanson* v. *United States, supra.*

[52] See, *e.g., Walker* v. *Birmingham,* 388 U. S. 307 (1967).

[53] See, *e.g.,* 18 U.S.C. §§921, 922, 1071 to 1074 (flight statutes).

ished.[54] This cannot be considered maintenance of "judicial integrity." "A deliberately false verdict debases the judicial process." *State* v. *Bisaccia,* 58 N. J. 586, 589, 279 A. 2d 675, 676 (1971).

Moreover, society's most basic assurance to its members, and its most cogent abstract existential justification is the protection of its members. "Primarily, governments exist for the maintenance of social order." *Chicago* v. *Sturges,* 222 U. S. 313, 322 (1911). Indeed, "[t]he first right of the individual is to be protected from criminal attack. The Bill of Rights was not intended to deny that primary mission." *State* v. *Bisaccia,* 58 N. J. at 540, 279 A. 2d *supra* at 677. Liberty, to some extent is surrendered by the very formation of society. Even so, democratic society protects freedom as well as assuring security. In return, it asks only for co-operation in the enforcement of its laws. If a policeman has broken the law, he should be punished. But society need not leave itself so unprotected as the exclusionary rule now requires.

Once, these arguments might have met with objection on the grounds that police conduct, at its most arrogant, was based upon a citizen's race, economic class, or political views.[55] Now, though, one need only look about. Attitudes toward people are changing, as is the composition of the police force. The exclusionary rule has outlived its usefulness, if ever it had any utility.

---

[54] See *Spiotto, supra,* at 255-59.

[55] See Amsterdam, *supra,* 58 *Minn. L. Rev.* at 394-95.

In view, of new realities, the judicial system protests its virtue too much. Indeed, if policemen injure themselves to uphold their conduct, the system's integrity has suffered whether or not the conduct is upheld. First, it fosters criminal activity. Second, the police response may be equally criminal. Third, it produces perjury. No system of justice can claim integrity when it creates such disfunctional conflict. In addition,

> [We] must be mindful that the contest is not between the State and the individual. The contest is wholly between competing rights of the individual—the right to be protected from criminal attack and the several rights in the Amendments. When the truth is suppressed and the criminal is set free, the pain of suppression is felt, not by the inanimate State or by some penitent policeman, but by the offender's next victims for whose protection we hold office. In that direct way, *Mapp* denies the innocent the protection due them.
>
> • • •
>
> But *Mapp* as applied calls for suppression whenever a search is found to violate the Amendment, even by a bare majority of a court, and notwithstanding that the policeman and the magistrate acted without a trace of insolence. *State* v. *Bisaccia, supra,* 58 N. J. at 590, 279 A. 2d at 677.

If insolence is to be deterred, other remedies can be effected.

Nonetheless, in some cases the egregiousness of the police conduct may still demand suppression of evidence. However, there is no reason that such conduct be de-

fined as "unreasonable" on the basis of current standards. Other parameters exist, such as bad faith, or intrusion disproportionate to the protection needed, while basic notions of due process would continue to assure the integrity of the judicial systems in extreme cases of official misconduct.[56]

Of these possibilities, in addition to strong civil remedies, *amicus curiae* respectfully submits that Fourth Amendment rights can be protected adequately by judging searches and seizures according to the good faith of the officers involved. Bad faith police conduct would still not preclude suppression of evidence. However, good faith police conduct need not be penalized. An operative definition of good faith should involve two components. First, whether the conduct under judicial scrutiny was obviously designed to effectuate legitimate police functions or was designed to harrass a "victim." Second, whether the officers themselves honestly believed that their search would disclose evidence of a crime. Honest belief and effectuation of legitimate police functions are

---

[56] See, *e.g.*, *Schmerber* v. *California, supra; Breithaupt* v. *Abram*, 352 U. S. 432 (1957); *Irvine* v. *California, supra; Rockin* v. *California, supra; Wolf* v. *Colorado, supra;* A.L.I. *Model Code of Pre-Arraignment Procedure*, Official Draft No. 1, §290.2 (2). See generally, Delinger, "Of Rights and Remedies; The Constitution As a Sword", 85 *Harv. L. Rev.* 532 (1972). Friendly, "The Bill Of Rights As a Code of Criminal Procedure"; 53 *Calif. L. Rev.* 929, 953 (1965). Levin, "An Alternative to The Exclusionary Rule For Fourth Amendment Violation," 55 *Judic.* 74, 75-76 (1974). Wright, "Must the Criminal Go Free If the Constable Banders?" 50 *Texas L. Rev.* 736, 741-45 (1972). See also Gray, "The Admissibility of Evidence Illegally Obtained In Scotland," 1966 *Judicial Rev.* 89; Hardin, "Other Answers: Search and

(Footnote continued on following page)

more than sufficient to assure that the police will not sully the integrity of the judicial system by arrogant or insolent action. Likewise, such a standard would eliminate the somewhat anomalous *ex post facto* "probable cause" determination of a trial judge who cannot fathom those indescribable, unquantifiable instincts which a working policeman must develop in order to survive "on the streets." Official insolence would be deterred and the integrity of the judicial system assured, but the guilty would have no escape either because of mere negligence or due to differing interpretations of "exigent circumstances" and "probable cause."

It may well be difficult to posit a policeman's good faith behavior as unreasonable under any circumstances. Yet, this is the end result of any successful invocation of the exclusionary rule. Any of the substitutions suggested immediately above would be preferable. Perhaps it might be argued that these standards substitute subjective for objective analysis. But, in view of current judicial determinations of probable cause *vel non*, subjectivity is already present in Fourth Amendment law. Actually, any parameters to some extent must be said to be subjective. It should be evident that "reasonableness" and "good faith" can be intimately related. This relationship could be more fully developed if Fourth Amendment determinations were made in a civil rather than a criminal context, and if "good faith" sufficed for the prosecution to withstand a motion to suppress.

(Footnote continued from preceding page)

Seizure, Coerced Confession and Criminal Trial in Scotland, 113 *U. Pa. L. Rev.* 165 (1964); Note, "The Exclusionary Rule," *supra*, 12 *Am. Crim. L. Rev.* at 524-36; Note, "Use of §1983 to Remedy Unconstitutional Police Conduct: Guarding the Guards", 5 *Harv. Civ. Rts. L. Rev.* 64 (1970); Note, "The Federal Injunction As A Remedy For Unconstitutional Police Conduct," 75 *Yale L.J.* 143 (1968).

E. Civil Remedies Are A Satisfactory Alternative To The Fourth Amendment Exclusionary Rule.

The exclusionary rule has failed to protect any legitimate rights. Law generally protects rights by assessing damages for invasions to those rights. The exclusionary rule simply does not do this. It protects only those who have transgressed criminal laws. It is a truism that the guilty go free and the innocent are generally left unprotected. This is an inversion of the goals which law is designed to achieve. Better the innocent should be protected. The establishment of strong civil remedial procedures will insure that the innocent will be protected, the guilty punished, and the Fourth Amendment more pervasively effectuated.

This Court has already held that Fourth Amendment rights may be the basis of recovery in tort suits against federal officers. *Bivens* v. *Six Unknown Narcotics Agents,* 403 U. S. 388 (1971).[57] Likewise, New Jersey has recently re-emphasized the efficacy of such remedies. *Cashen* v. *Spann,* 66 N. J. 541, 334 A. 2d 8 (1975). These remedies establish viable means for assertion of rights against truly unreasonable governmental intrusions. Theoretically, the guilty as well as the innocent may recover. But the guilty would also receive just deserts. Moreover, civil damage suits would not be the exclusive mode of redress. Police departments would of necessity become more responsive to citizens' complaints.[58] Disciplinary action could be taken, from mild reprimands to expulsion or imposition of criminal sanctions, depending on the

---

[57] See 28 U.S.C. §1343 (3); 42 U.S.C. §1983; *Monroe* v. *Pape,* 365 U. S. 167 (1961). See also *Lynch* v. *Household Finance Corp.,* 405 U. S. 538 (1972).

[58] See, *e.g., Burger,* "Who Will Watch the Watchmen?" 14 *Am. U. L. Rev.* 1 (1964).

character of the conduct.[59] Finally, an exclusionary rule would still exist, but its purview would extend only to cases of bad faith police conduct.

In any event, enforcement of the Fourth Amendment would reside more directly in the People. By placing the ultimate responsibility for enforcement at the local level, political pressure could more easily influence offensive police practices. From its adoption to 1961, the Fourth Amendment had been directed only against federal abuses. Return of the means of its vindication to the States, and ultimately to the People, would be consistent with its objectives. Local community democracy is at the very roots of the Republic.[60] Times have altered drastically since 1961. *Amicus curiae* respectfully submits that this Court should recognize those changes. At the very least, the choice of means by which the Fourth Amendment is enforced should be returned to the States.[61]

---

[59] See generally notes 55-58 *supra* and accompanying text.

[60] See generally, *e.g.,* 2 Tocqueville, *Democracy in America* (Vintage Ed. 1945) at 99-130; Sydnor, *American Revolutionaries In the Making,* (Free Press Ed. 1967) at 107-18. Zuckerman, *Peaceable Kingdoms* (1970).

[61] *Amicus curiae* recognizes that there are some areas of Fourth Amendment law and application in which it has neither experience nor expertise, as in border searches. See, *e.g., Bower* v. *United States,* —— U. S. ——, 95 S. Ct. 2569 (1975); *United States* v. *Ortiz,* —— U. S. ——, 95 S. Ct. 2585 (1975); *United States* v. *Brignonti-Ponce,* —— U. S. ——, 95 S. Ct. 2574 (1975); *Almeida-Sanchez* v. *United States,* 413 U. S. 266 (1975). Consequently, *amicus curiae* makes no representation concerning the efficacy of the exclusionary rule in the Federal courts. Thus, its representation and argument is focused on *Mapp* v. *Ohio,* and *amicus* asks only that that case be overruled.

POINT II

If this Court declines to abrogate or modify the exclusionary rule, it should nevertheless hold that such issues are not cognizable as of course in federal habeas corpus proceedings.

Federal habeas corpus has been available to state prisoners on an expansive scale since *Fay* v. *Noia*, 572 U. S. 391 (1963). In *Fay* v. *Noia, supra,* however, this Court explicity minimized the great effect its decision would have on the administration of justice throughout the state and federal systems. Rather, the Court opined that "[t]hose few who are ultimately successful are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Id.* at 440-91. This prophecy has proven to be erroneous.

Historically, the Great Writ was available only to those who were incarcerated unjustly.[62] Recent scholarship has shown that, traditionally, the presence or absence of jurisdiction in the committing court determined "justice" or the lack thereof in any judgment of conviction.[63] Mem-

[62] See, *e.g., Schneckloth* v. *Bustamonte, supra,* 412 U. S. at 256-58 (Powell, J., concurring); *Fay* v. *Noia, supra,* 372 U. S. at 401-02. Compare Pollak, "Proposals to Curtail Federal Habeas Corpus for State Prisoners: Collateral Attack on the Great Writ," 66 *Yale L.J.* 50, 65 (1960) with Reitz, "Federal Habeas Corpus: Post Conviction Remedy for State Prisoners," 108 *U. Pa. L. Rev.* 461, 497 (1960).

[63] Bator, "Finality in Criminal Law and Federal Habeas Corpus for State Prisoners," 76 *Harv. L. Rev.* 441, 466-75 (1963); Oaks, "Legal History in the High Court—Habeas Corpus," 64 *Mich. L. Rev.* 451, 452 (1966). See, *e.g., Schneckloth* v. *Bustamonte, supra,* 412 U. S. at 253-54 (Powell, J., concurring). Compare *Andrews* v. *Swartz,* 156 U. S. 272 (1895) with *In re Moran,* 203 U. S. 96 (1906) and *Ex parte Watkins,* 28 U. S. (3 Pet.) 193 (1830).

bers of this Court have recently recognized the validity of that scholarship.[64] However, as they also recognize, it is not necessary to limit the writ's availability to jurisdictional cases.[65] As notions of justice have evolved, so too has the role of the writ changed. Nonetheless, the Great Writ's role as an extraordinary remedy, a "High Prerogative Writ",[66] must always be remembered if the modern writ is to have any real meaning.

However, various procedural and substantive requirements have been so relaxed that federal habeas has become but another phase in the general appellate process.[67] Few state criminal judgments are truly final. Relitigation may be endless. Comity has been discarded. Of course, in some situations, a federal collateral remedy is salutary. In search and seizure cases it is not a requisite to justice. Consequently, the Great Writ should not be available to state prisoners who seek release predicated on application of the exclusionary rule.

Admittedly, an extraordinary deprivation of liberty demands an extraordinary remedy. Federal habeas corpus attempts to provide this remedy by issuing where basic

[64] *Schneckloth* v. *Bustamonte, supra,* 372 U. S. at 250 (Powell, J., concurring, with Burger, C. J., and Rehnquist, J.). See *id.* at 249 (Blackmun, J. concurring); *Kaufman* v. *United States,* 394 U. S. 217, 231 (1969) (Black, J., dissenting); *id.* at 249 (Harlan, J., with Stewart, J., dissenting).

[65] *Id.*

[66] 3 *Blackstone, Commentaries* *331.

[67] See, *e.g., State* v. *Funnicello,* 60 N. J. 60, 69, 286 A. 2d 55, 59 (1972). (Weintraub, C. J., concurring) (concerning death penalty, but remarks relevant to *habeas corpus* applicable here).

federal constitutional rights are involved.[68] Further, denial of certain federal rights may well produce incarceration of the innocent.[69] Hence, habeas is quite proper where such rights have been denied, for in such cases justice has been denied. However, the federal habeas petitioner who alleges only that he was incarcerated as a result of an "unreasonable" search or seizure has been deprived neither of justice nor of right.

"Justice" cannot hinge upon the reasonableness of a search or seizure. First, the prisoner is guilty, so his incarceration is just.[70] Second, since the whole concept of "reasonableness" is so ephemeral, no state court's characterization of a search as reasonable could be "unjust". See Point I, *supra*. Of course, it is presumed that motions to suppress are available in state courts and that these motions are decided in good faith. The failure of a state system to provide such a remedy would be a denial of procedural due process. Moreover, the good faith of courts is an inherent assumption in our system of jus-

---

[68] See, *e.g.*, *Fay* v. *Noia, supra; Townsend* v. *Sain*, 372 U. S. 293 (1963).

[69] *E.g.*, denial of the right to counsel; denial of the right to trial by a jury of defendant's peers free from prejudice; denial of the right to be tried in the district where the offense was committed; denial of right to trial in atmosphere free of adverse pre-trial publicity; denial of right to speedly trial; denial of right to cross-examination; denial of right to be free from coercion in exercise of privilege against self-incrimination. The foregoing list is, of course, by no means exhaustive.

[70] See, *e.g.*, Amsterdam, "Search and Seizure and Section 2255," 112 *U. Pa. L. Rev.* 378 (1964) (Federal prisoners, but analysis also applicable here). Friendly, "Is Innocence Irrelevant? Collateral Attack On Criminal Judgments" 38 *U. Chi. L. Rev.* 162 (1970).

tice. Consequently, a single federal district court's substitution of its judgment for a state determination insults both comity and the integrity of American justice. Only when this Court speaks may the needs of justice fairly be said to have been clarified. Of course, in Fourth Amendment law, justice may be obtained more easily than clarity. Again, in a pragmatic sense, the state prisoner who claims deprivation of Fourth Amendment rights is guilty. His incarceration is pragmatically just. Therefore, he should not be permitted to raise collaterally that which may well have been determined, or could have been determined, directly. Only if the deprivation becomes one of due process should he be heard. *Cf. Rochin* v. *California, supra.*

Moreover, one who has been incarcerated as the result of an unreasonable search or seizure really has been denied no constitutional right. There is no Fourth Amendment right to exclusion of evidence. See Point 1, *supra.* Again, exclusionary rule issues have no place in federal habeas proceedings. The relationship of the rule to the right is too tenuous to be cognizable under 28 U.S.C. §2254 (a).

Neither right nor justice inhere in habeas cases hinging on the exclusionary rule. The innocence of such petitioners is never in issue. The Great Writ has been perverted. Its function is irrelevant to its nature in such cases. At the very least, habeas petitioners who would challenge their incarceration on search or seizure grounds should be compelled to demonstrate the justice of their claims. They should be required to make a colorable showing of innocence. This, at least, would restore the Great Writ to its role as an instrument of justice. In sum, *amicus curiae* respectfully submits that relief under 28 U.S.C. §2254 (a) should not be granted for unreasonable searches or seizures.

POINT III

Rehabilitation of search warrants issued on less than probable cause is a realistic and balanced approach to cases where the exclusionary rule's purposes have been served by the fact that the officers involved have obtained a warrant prior to the search.

Police officers who, in good faith, have obtained a search warrant have demonstrated that they have been deterred from engaging in arrogant or insolent official conduct. Likewise, the pre-search determination of probable cause by a neutral magistrate clearly meets those criteria required by any concern for judicial integrity which in part produced the exclusionary rule. Consequently, the procedures attendant to obtaining a search warrant have theoretically satisfied the threshold requirements of the exclusionary rule's foundation. Any errors of judgment by the issuing magistrate reflect neither police misconduct nor judicial hypocrisy.

It would therefore seem illogical to contend that considerations derived from the exclusionary rule, or even the rule itself, prohibit rehabilitation of the warrant with additional oral testimony at the motion to suppress. Had the police known that more information was needed to establish probable cause, they undoubtedly would have endeavored to provide the issuing magistrate with that information. Policeman are not lawyers, and they cannot be held to know the legal intricacies of the criteria which define probable cause. See, *e.g., United States* v. *Ventresca, supra.* See also Point I, *supra.* Thus, this Court has held that affidavits in support of a warrant can be further bolstered by oral testimony at the initial issuance hearing. See *Whitely* v. *Warden,* 401 U. S. 560, n. 8 at

565 (1971).[71] If the magistrate errs by failing to elicit that additional data sufficient to demonstrate the existence of probable cause, and then if the magistrate compounds the error by issuing the warrant, the trial judge should have the discretion to rectify the error. However, the correctional process need not be limited to suppression of the evidence. If the officers did in fact have sufficient facts to establish probable cause, but the magistrate did not consider those facts necessary to issue the warrant, then the exclusionary rule's bases would not be offended by oral testimony at the motion to suppress to rehabilitate the warrant.

Consequently, it would follow that the prosecuting authority should be permitted to introduce whatever additional information it had at the time the warrant was issued.[72] If probable cause is then established, there would seem to be no reason proscribing the admission of the evidence. Such an approach would balance the interest of society in convicting the guilty with its current interest in requiring that searches be made only on probable cause.

In effect, this approach would simply deem the issuing magistrates error to be harmless under the circumstances.

---

[71] See, *e. g., Aquilar* v. *Texas, supra,* 378 U. S. 109, n. 1; *Campbell* v. *Minnesota,* 487 F. 2d 1 (8 Cir. 1973); *United States ex rel. Gaugler* v. *Brierley,* 477 F. 2d 516 (3 Cir. 1973); *Boyer* v. *Arizona,* 455 F. 2d 804 (9 Cir. 1972); *United States ex rel. Pugach* v. *Mancusi,* 411 F. 2d 177 (2 Cir.) *cert. den.* 396 U. S. 889 (1969); *Naples* v. *Maxwell,* 393 F. 2d 615 (6 Cir. 1965).

[72] Indeed, where defendant asserts perjury or misrepresentation, such examination is necessary. *United States* v. *Marihart,* 492 F. 2d 897 (8 Cir. 1974); *United States* v. *Carmichael,* 489 F. 2d 983 (7 Cir. 1973) (*en banc*); *United States* v. *Danning,* 425 F. 2d 836 (2 Cir. 1969).

Cf. Chapman v. *California,* 386 U. S. 18 (1967). *Amicus curiae* respectfully submits that nothing in the procedural or substantive law of the Fourth Amendment demands more. If any jurisdiction wishes to adopt an alternative approach, for whatever reasons, and to prohibit such rehabilitation, they undoubtedly may. *Cf. e.g. Oregon* v. *Hass,* —— U. S. ——, 95 S. Ct. 1215 (1975).[73] Nonetheless, the requirements of the Fourth Amendment exclusionary rule demand no such result. The matter is simply one of procedure and not of constitutional dimension.[74]

---

[73] In New Jersey, the State Appellate Division has recently held that oral testimony may supplement affidavits at the initial hearing. *State* v. *Fariello,* 133 N. J. Super. 114, —— A. 2d —— (App. Div.) *cert. gr.* —— N. J. ——, —— A. 2d —— (1975). See also, *e.g., Commonwealth* v. *Milliken,* 450 Pa. 310, 300 A. 2d 78 (1973); *State* v. *Beal,* 40 Wis. 2d 607, 162 N. W. 2d 64 (1968); *State* v. *Misch,* 23 Ohio Misc. 47, 260 N. E. 2d 841 (C. Pl. 1970).

[74] *Cf. Fed. R. Crim. P.* 41 (c); *Gillespie* v. *United States,* 368 F. 2d 1, 4 (8 Cir. 1966). But see also *United States* v. *Whitlong,* 339 F. 2d 975, 979 (7 Cir. 1964).

CONCLUSION

For the foregoing reasons Amicus Curiae respectfully submits that the Fourth Amendment exclusionary rule should be abrogated or modified, that in the alternative exclusionary rule issues should not be cognizable in federal habeas corpus proceedings or that rehabilitation of search warrants should be permitted.

Respectfully submitted,

WILLIAM F. HYLAND
Attorney General of the State of New Jersey
Attorney for the State of New Jersey, Amicus Curiae

DAVID S. BAIME,
JOHN DECICCO,
DANIEL LOUIS GROSSMAN,
Deputy Attorneys General,
Of Counsel and on the Brief.

MOTION FILED
AUG 13 1975

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER, OF AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., THE NATIONAL DISTRICT ATTORNEY'S ASSOCIATION, INC., AND THE ILLINOIS ASSOCIATION OF CHIEFS OF POLICE, INC.

FRANK CARRINGTON, Esq.,
FRED E. INBAU, Esq.,
WAYNE W. SCHMIDT, Esq.,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60201,
JAMES R. THOMPSON, Esq.,
WINSTON & STRAWN,
One First National Bank Plaza,
Chicago, Illinois 60603,
JAMES P. MANAK, Esq.,
National District Attorney's Association, Inc.,
211 East Chicago Avenue,
Chicago, Illinois 60611,
Counsel for Amici Curiae.

Of Counsel:
WILLIAM K. LAMBIE, Esq.,
STEPHEN I. MAYO,
ROBERT G. HIGGINS,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60601,

Gunthorp-Warren Printing Company, Chicago • Financial 6-6565

TABLE OF CONTENTS.

PAGE

Table of Authorities ii

Motion for Leave to File a Brief *Amici Curiae*, in Support of the Petitioner, of Americans for Effective Law Enforcement, Inc., the National District Attorneys Association, Inc., and The Illinois Association of Chiefs of Police, Inc. 1

Interest of *Amici Curiae* 2

Brief *Amici Curiae* in Support of the Petitioner 5

Summary of Argument 5

Argument

I. The Exclusionary Rule Should be Modified to Admit Evidence Obtained by Good Faith Conduct of the Police Where Exclusion Would Have No Deterrent Effect Upon Such Conduct 9

II. This Court Should Hold That the Constitutional Validity of the Entry and Search of Respondent's Premises by Omaha Police Officers Under the Circumstances of this Case Is Not a Question Properly Cognizable Under 28 U. S. C. Section 2254 29

Conclusion 31

Table of Authorities.

Cases.

Adams v. *Williams*, 407 U. S. 143 (1972) 26
Almeida Sanchez v. *United States*, 413 U. S. 226 (1973).. 10
Bivens v. *Six Unknown Narcotics Agents*, 403 U. S. 388 (1971) 15, 18, 19, 28
California v. *Krivda*, 409 U. S. 40 (1972) 9
Chapman v. *United States*, 365 U. S. 610 (1961) 26
Davis v. *Mississippi*, 394 U. S. 721 (1969) 21
Fuller v. *Alaska*, 393 U. S. 80 (1969) 10, 11
Hill v. *Rowland*, 472 F. 2d 1374 (4th Cir. 1973) 7, 17
Illinois v. *Allen*, 397 U. S. 337 (1970) 16
Katz v. *United States*, 389 U. S. 347 (1967) 23
Lankford v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966)..8, 21, 22
Linkletter v. *Walker*, 381 U. S. 618 (1965) 10, 11
Mapp v. *Ohio*, 367 U. S. 643 (1961) 9, 19
Mayberry v. *Pennsylvania*, 400 U. S. 455 (1971) 16
Michigan v. *Tucker*, 417 U. S. 433 (1974) 15
Rice v. *Wolff*, 513 F. 2d 1280 (8th Cir. 1975) 21, 22, 23
Schneckloth v. *Bustamonte*, 412 U. S. 218 (1973) 29
State v. *Kasold*, 110 Ariz. 558, 521 P. 2d 990 (1974)... 30
State v. *Kasold*, 110 Ariz. 563, 521 P. 2d 995 (1974) 30
State v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972) .. 17
Terry v. *Ohio*, 392 U. S. 1 (1968) 26, 27
United States v. *Harris*, 403 U. S. 473 (1971) 24
United States v. *Peltier*, ... U. S. ....., 95 S. Ct. 2313 (1974) 6, 10, 11

United States v. *Robinson*, 414 U. S. 218 (1973) 9
United States v. *Ventresca*, 380 U. S. 102 (1965)..... 23

Statutes.

28 U. S. C. 2254 .....9, 29, 31, 32
42 U. S. C. 1983 15
23-2401 et seq. RRS Nebraska 15
81-8, 209 et seq. RRS Nebraska 15

Articles.

Oaks, "Studying the Exclusionary Rule in Search and Seizure" 37 U. Chi. Law Rev. 665 (1970) 12
Spiotto, "Search and Seizure: An Empirical Study of the Exclusionary Rule and Its Alternatives". I Journal of Legal Studies (University of Chicago Law School) 243, January, 1973 12
LaFave, "Search and Seizure: The Court of True Law Has Not Run Smooth" 1966 Ill. L. F. 255 12

Miscellaneous.

Nedrud, "The Criminal Law" 1969-1975 .....12, 27, 28
1973 Suggested Legislation, Council of State Governments, Iron Works Pike, Lexington, Ky. 40505 p. 214 15
Brief, *Amici Curiae*, of Americans for Effective Law Enforcement, Inc. and the International Association of Chiefs of Police, Inc., in *Adams* v. *Williams*, 407 U. S. 143 (1972) 27
Brief, *Amicus Curiae*, of the State of Arizona in *Wolff* v. *Rice*, No. 74-1222, October Term 1974 30

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

MOTION FOR LEAVE TO FILE A BRIEF AS AMICI CURIAE IN SUPPORT OF THE PETITIONER.

Americans for Effective Law Enforcement, Inc. The National District Attorney's Association, Inc., and The Illinois Association of Chief of Police, Inc. respectfully move this Court for leave to file a brief, *amici curiae*, in support of the petitioner in the instant case. This motion is made pursuant to Rule 42 of the Supreme Court Rules. The petitioner has consented to our filing; the respondent has not responded to our request for consent to file. Accordingly, we are moving the Court directly for leave to file. A letter from counsel for the petitioner has been filed with the Clerk of this Court. The interest of the *amici curiae* and our reasons for desiring to file are set forth below.

INTEREST OF THE AMICI CURIAE.

Americans for Effective Law Enforcement, Inc.—(AELE), is a national, not-for-profit, non-partisan, non-political organization incorporated under the laws of the State of Illinois. As stated in its by-laws, the purposes of AELE are:

1. To explore and consider the needs and requirements for effective enforcement of the criminal law.
2. To inform the public of these needs and requirements, to the end that the courts will administer justice based upon a due concern for the general welfare and security of law abiding citizens.
3. To assist the police, the prosecution, and the courts in promoting a more effective and fairer administration of the criminal laws.

In furtherance of these objectives, AELE seeks to represent in our courts, nationwide, the concern of the average citizen with the problems of crime and of police effectiveness in dealing with crime.

The National District Attorneys Asociation (NDAA) is a nonprofit, nonpolitical, tax exempt corporation composed of approximately 6,000 members representing all 50 states. The purposes of the National District Attorneys Association are, *inter alia,* to improve and to facilitate the administration of justice in the United States and to promote the study of law and legal institutions.

To effectuate these aims the National District Attorneys Association for many years has utilized an Amicus Curiae Committee to file briefs in cases of national importance in the United States Supreme Court. The NDAA seeks to make known the views of all prosecutors in America and to bring before this Court their position on matters affecting the discharge of the duties of prosecutor.

The Illinois Association of Chiefs of Police, Inc., is a not-for-profit Illinois association and consists of over 600 members who are Illinois police chiefs and senior law enforcement executives.

Each of the *amici* herein has an abiding interest in the effectiveness of law enforcemet in this country. The instant case presents questions of more than usual impact upon the effectiveness of law enforcement: the continued viability of the Exclusionary Rule; the extent to which Federal *habeas corpus* relief should be granted to state petitioners alleging claims of illegal search and seizure; and the permissible extent of police activity when the most exigent circumstances exist. Thus, each of the *amici* believes that it has a direct interest in the outcome of this case.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975.

No. 74-1222

CHARLES L. WOLFF, JR., WARDEN, NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

BRIEF AMICI CURIAE IN SUPPORT OF THE PETITIONER.

SUMMARY OF ARGUMENT.

This case presents a firm factual and legal basis for this Court to decide the question of whether the Exclusionary Rule should be modified to permit the admission of evidence obtained by the police, in good faith, where exclusion of that evidence will have little or no deterrent effect on police misconduct.

Amici will not reiterate all of the arguments pro and con about the Exclusionary Rule; we will confine ourselves to the argument that logic and common sense dictate that the sanction of suppression of evidence does not, and can not, deter illegal

police conduct. We will then expand this argument to the facts of this case.

The Exclusionary Rule rests on two often enunciated judicial bases: 1) the "imperative of judicial integrity" requires the exclusion of tainted evidence, and; 2) the exclusion of illegally seized evidence will deter unlawful police conduct. With regard to the "imperative of judicial integrity" this Court only last term, refused to apply retroactively the line of cases which now prohibit roving border patrol searches, because the law enforcement officers involved acted in good faith reliance on a federal statute, *United States* v. *Peltier*, ____ U. S. ____, 95 S. Ct. 2313 (1974). The Court specifically rejected the judicial integrity argument. We argue, by analogy, that, when the police are acting in complete good faith, judicial integrity would not be offended by admitting the evidence in a case such as the instant case.

Insofar as the deterrence rationale of the Exclusionary Rule is concerned, we must look at the state of mind of the target of the Rule, the law enforcement officers themselves. First it must be pointed out that policeman go into most search and seizure situations laboring under three distinct disadvantages:

1. The law of search and seizure is so exceedingly complex and confusing that it is unrealistic to expect a policeman, untrained in the law, to be able to grasp it sufficiently to conduct himself in a flawless manner.
2. Policemen, in most cases, must make their decision whether or not to search in a matter of minutes or hours. They do not have the advantage of the months or even years available to reviewing courts to mull over the propriety of their conduct.
3. Policemen must make their decisions "on the street", that is, under the very real stresses and pressures of law enforcement work today.

Given these factors, a policeman about to embark on a conduct of search and seizure can have two, and only two, states of mind. He acts in bad faith, knowing that his conduct is illegal and that any evidence that he obtains will be suppressed, or he acts in the good faith belief that his conduct is lawful and that the evidence will not be suppressed.

The threat of suppression is obviously of no deterrent value against the officer who acts in bad faith for, by definition, he acted as he did *in spite of* that threat. The remedy for such conduct is a *direct* action against the errant officer and/or the entity which hired him and the trend, both in the legislatures and in the courts, is in the direction of such actions.

We submit that far and away the greatest majority of our law enforcement officers act in good faith when they make searches and seizures, but they do make mistakes. Logically, however, the threat of exclusion of evidence cannot have a deterrent effect on officers acting in good faith because they have acted as they did in the belief, albeit mistakenly, that they were acting properly. Again, the proper remedy for aggrieved parties is an action against the entity which hired the offending officer; not, however, against the officer himself, for it would be extremely unfair to punish the officer for his good faith actions, as the law clearly holds. *Hill* v. *Rowland*, 472 F. 2d 1374 (4th Cir. 1973).

What then of the claimed "educational effect" of the Exclusionary Rule upon law enforcement officers? We submit, very little. The complexity and confusion inherent in the law of search and seizure and the long delays involved in court decisions dealing with search and seizure questions (which are themselves often contradictory and confusing) create a "condition of remoteness" on the part of law enforcement officers from the postulated educational effect of the Exclusionary Rule.

Turning to the facts of the instant case, we submit that the opinion of the lower court which compared the action of the Omaha police, in this case, with that of the Baltimore police

in *Lankford* v. *Gelston*, 364 F. 2d 197 (4th Cir. 1966), is unfair. In *Lankford* the police made a dragnet type search of some 300 homes, while in the instant case the Omaha police made a search of four places, each of which had at least a *rational* connection with the individuals being sought pursuant to a valid arrest warrant for the murderer of a police officer.

Next, it seems to us that the fact that the Omaha police officers who went to respondent Rice's house took the time to get a search warrant is conclusive evidence that they were acting in the utmost good faith. They had absolutely no way of knowing that the search warrant, after being sustained by the Supreme Court of the State of Nebraska, would be held invalid by the federal courts. Nor could the police have possibly suspected that, by some inverted process of logic, the hour that it took them to secure the search warrant for Rice's house would be used by the federal courts to destroy the claim of "exigent circumstances" which might have sustained an immediate entry into and search of respondent's house.

Given the obvious good faith of the Omaha police it is obvious that they were not deterred by the Exclusionary Rule when they made the search in question *because they thought they were acting properly*. Nor will an affirmance by this Court of the lower court's decision have much of an educational effect upon future police officers similarly situated given the "condition of remoteness" from this effect based upon the considerations of the complexity of search and seizure law and the time factors which were discussed above.

In summary, we submit that this case presents a vehicle for this Court to modify the Exclusionary Rule to the extent that when the police are acting in good faith and little deterrent purpose will be served, evidence seized should be admissible. Additionally, we believe that if this were done the police of this country would respond positively and would continue their efforts to comply in good faith with the rules which circumscribe their conduct.

If this Court is not of a mind to modify the Exclusionary Rule, as we have urged above, then it should rule that search and seizure claims such as are involved in this case, and which have been definitively decided by state supreme courts should not be cognizible in federal habeas corpus actions under 28 U. S. C. 2254. This entire argument has been clearly set out in the concurring opinion of Mr. Justice Powell in *Schneckloth* v. *Bustamonte*, 412 U. S. 218 (1973). *Amici* do not believe that they can add much to this except to point out that much of the complexity and confusion involved in search and seizure cases stems from the fact that, under 28 U. S. C. 2254, lower federal courts sit as courts of review of state supreme court determinations. Much of this complexity could be resolved by giving some finality to state court determinations.

ARGUMENT.

I. The Exclusionary Rule Should Be Modified to Admit Evidence Obtained by Good-Faith Conduct of the Police Where Exclusion Would Have No Deterrent Effect Upon Such Conduct.

The instant case squarely presents the issue of whether the Exclusionary Rule, mandated as a constitutional rule of criminal procedure by this Court in *Mapp* v. *Ohio*, 367 U. S. 643 (1961), should be modified to admit evidence obtained by good-faith conduct of the police where exclusion of the evidence would have no deterrent effect upon police misconduct.

Amici believe that little of a useful nature will be accomplished by our reiterating in detail all of the arguments, pro and con, about the Exclusionary Rule. No one could be more conversant with such arguments than the members of this Court and the issue has been thoroughly briefed and argued before the Court on at least two prior occasions.[1] We will thus confine our-

1. *California* v. *Krivda*, cert. dismissed as improvidently granted, 409 U. S. 40 (1972); *United States* v. *Robinson*, 414 U. S. 218 (1973), rev'd other grounds.

selves to the argument that, based upon the facts of the instant case and upon considerations of logic and common sense, the Exclusionary Rule should be modified to admit the evidence seized against respondent Rice.

Such an analysis must begin with a brief consideration of the purpose and the basic rationale for the implementation of the Exclusionary Rule by this Court. In *United States* v. *Peltier*, ... U. S. ....., 95 S. Ct. 2313 (1975), in which this Court refused to accord retroactive effect to the prohibition against roving Border Patrol searches enunciated in *Almeida-Sanchez* v. *United States*, 413 U. S. 226 (1973), the purposes of the Rule were characterized as twofold: "the imperative of judicial integrity" and the deterrent purpose of the rule.[2]

The majority of the Court in *Peltier*, however, had no trouble in denying retroactive effect to *Almeida-Sanchez* despite the issue of "judicial integrity" stating that:

> The teaching of these retroactivity cases is that if the law enforcement officers reasonably believed in good faith that evidence they had seized was admissable at trial, the "imperative of judicial integrity" is not offended by the introduction into evidence of that material even if decisions subsequent to the search and seizure have broadened the exclusionary rule to emcompass evidence seized in that manner. ..... U. S. at ....., 95 S. Ct. at 2317.

The *Peltier* opinion went on to state the following which we believe to be apropos to the facts of this case:

> It would seem to follow, *a fortiori*, from the *Linkletter* and *Fuller* holdings that the "imperative of judicial integrity" is also not offended if law enforcement officials reasonably believed in good faith that their *conduct* was in accordance with the law even if decisions subsequent to the search or seizure have held that conduct of the type engaged in by law enforcement officials is not permitted by the Constitution. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

2. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

Concededly, the Court in *Peltier* was addressing itself to the issue of the retroactivity of court decisions and the impact of such retroactivity upon "the imperative of judicial integrity", an issue not present in the instant case; however, we submit that the principle is the same when applied to the facts of this case. If judicial integrity is not offended when the good faith belief on the part of law enforcement officers that their conduct in search and seizure activities was lawful will serve as a bar to the retroactive application of the Exclusionary Rule, such a good faith belief should likewise be held not to offend judicial integrity when the *direct* application of the Exclusionary Rule is called into question.

The Court noted in *Peltier*, that law enforcement officials in such cases as *Linkletter* v. *Walker*, 381 U. S. 618 (1965) and *Fuller* v. *Alaska*, 393 U. S. 80 (1969) could have had no doubt that their conduct was *unlawful;* they merely were unable to foresee the application of the Exclusionary Rule to state criminal trials.[3] Yet retroactivity was denied.

If judicial integrity is not offended when retroactivity of the Exclusionary Rule is denied even in cases of *bad* faith police conduct, it is difficult to conceive that it would be offended even by prospectively banning the application of the rule in cases in which the police are patently acting in *good* faith.

If, then, as we suggest, the "imperative of judicial integrity" would not be offended by the modification of the Exclusionary Rule to the extent that evidence should not be suppressed when the conduct of the police gives every evidence that they believed in good faith that their search and seizure activities were lawful, the question immediately arises as to the second, and most often enunciated, reason for the Exclusionary Rule: The deterrence of unlawful police conduct.

This is the basic question which is involved in any consideration of a modification of the Exclusionary Rule: does it, or does it not, deter unlawful police conduct?

3. ..... U. S. at ....., 95 S. Ct. at 2317-2318.

There is, unfortunately, an extreme paucity of empirical data as to the deterrent effect of the Exclusionary Rule. However, the major study of this which has been made in this country reached the unequivocal conclusion that there is no evidence to support the deterrent effect of the Rule.[4]

Perhaps a more effective way in which the supposed deterrent effect of the Exclusionary Rule can be examined would be to apply simple, common sense principles in order to ascertain whether or not such a rigid prophylactic as the Exclusionary Rule could really accomplish its purported purpose. In order to do this we must examine the state of mind of police officers who are confronted with search and seizure problems, for, obviously, if someone is to be deterred, he must know in his own mind both that he is, indeed, supposed to be deterred from doing something, and what it is that he is supposed to be deterred from doing.

At the outset it must be borne in mind that police officers are not, for the most part, trained in the law. To be sure, the greatest majority of policemen receive some hours of pre-service training, in-service training, or both, in the law of search and seizure and Constitutional law. But when we consider the fact that the law of search and seizure is so amazingly complex,[5] that it is fraught with innumerable variables depending on the given factual situations, and the fact that there are large numbers of court decisions—often conflicting with each other or containing built-in conflicts between concurring and dissenting judges in a single opinion,[6] the conclusion is inescapable that no amount of formal

4. Oaks, "Studying the Exclusionary Rule in Search and Seizure," 37 University of Chicago Law Review, 665 (1970). See also, Spiotto, "Search and Seizure: An empirical Study of the Exclusionary Rule and its alternatives, "I Journal of Legal Studies, (University of Chicago Law School), 243, January 1973.

5. See, *e.g.*, LaFave, "Search and Seizure, The Course of True Law Has Not Run Smooth" 1966 Ill. L. F. 255.

6. For example, Nedrud: "The Criminal Law," a compilation of all of the reported appellate opinions in criminal law and procedure cases, reported, between January 1970 and May of 1975, *3,732* appellate decisions rendered in cases involving only *warrantless* search and seizure cases.

police training is going to be enough to make the policeman sufficiently expert in the law of search and seizure that he will conduct himself flawlessly when confronted with such problems.

To these observations must be added the fact that in many, if not most, search and seizure cases the policeman will have a relatively short amount of time to make his decision as to whether or not to search. The period of time in question may vary from a matter of minutes—for example when a patrolman must decide to stop and search a car that resembles a getaway car in a recent armed robbery; to a matter of about an hour, for example, in the instant case where the police delayed entry into Rice's house for about an hour in order to procure a search warrant; to a matter of hours or even days, as when a major raid is being planned. But in no case will the policeman have the benefit of weeks, months or even years accorded to the courts, especially appellate courts, to review his decision to search.

Finally it must be remembered that most search and seizure decisions are made under the stress of ongoing criminal investigations or other law enforcement activity. We do not argue for a moment that the stresses and pressures of law enforcement can be used to excuse willful or intentional actions by police officers, which deprive citizens of their Constitutional rights. We do argue, however, that such stresses and pressures may, indeed must, be taken into consideration when the state of mind of the police officer is being assessed.

With these three factors in mind—the incredible complexity of the law of search and seizure, the relatively short amounts of time in which an officer has to make a decision whether to search or not, and the pressures involved in the enforcement of the criminal law—we now turn in an examination of the deterrent effect of the Exclusionary Rule upon the targets of the rule: the law enforcement officers themselves.

At the time that a policeman makes the decision which commits him to a given search and seizure he can have two, and only

two, states of mind. First he can know that he has no right to make the given search, *e.g.* that he has no probable cause whatever, that the purpose of the alleged search is purely to harrass the target or that he is making random searches based upon nothing but some sort of vague "hunch". This is the mental condition of *bad faith.*

Second, the officer in question can reasonably believe, *in good faith* that the action that he is taking is lawful, *e.g.* where he has a search warrant, where he reasonably believes that he has probable cause and that a warrant is unnecessary, or where he believes the exigencies of the situation require immediate action to protect himself or others.

How does the supposed deterrent effect of the Exclusionary Rule work on these two states of mind? First, consider the officer who acts in bad faith. The most elementary concepts of logic and common sense dictate that, by definition, the Exclusionary Rule can have no effect whatsoever. The officer acting in bad faith for whatever particular perverse reasons he may have had, has made his search *knowing* that whatever evidence he may turn up will be suppressed.[7] He simply does not care and has obviously not been deterred by the threat of suppression of evidence, illegally seized, because he seized the evidence in the full knowledge that it *would* be suppressed.

The only way that such bad faith conduct can be deterred is by proceeding directly against the errant officer and/or against the municipality or other government entity that hired him. This can be done. Every state has provisions, most sounding in common law tort, for redress of violations of rights of citizens by police officers, and this court has held that questions of illegal searches and seizures by law enforcement officers are cognizable

7. It is of course a basic fact that the "protection" of the Exclusionary Rule extends *only* to those parties who have had evidence of guilt seized from them and then suppressed. For the *innocent* party, aggrieved by an unlawful search and seizure, the suppression doctrine has had no protective effect whatever.

in federal district courts under 42 U. S. C. 1983.[8] Additionally, 40 states have, in some form, waived tort immunity or otherwise made provision for redress to be made to the aggrieved party from the government entity which hired the errant officer,[9] so that, in those states at least, there is a remedy over, not only against the officer but against the government entity involved.

Thus it seems clear that in the case of bad faith police conduct, the Exclusionary Rule has deterred the officer not a whit and the only remedy is and should be, the direct one. No one likes to be sued, not even police officers who act egregiously, and the officer who engages in willful misconduct, while undeterred by the application of the suppression doctrine, will very likely be deterred, either by a direct proceeding against himself, or by knowing that he may very well be faced with dismissal, demotion or suspension because his unlawful activities have resulted in his city or state having to pay a major judgment or settlement to the aggrieved party.

We turn now to an examination of the deterrent effect of the Exclusionary Rule on the officer who makes a decision to search in the good faith belief that he is acting lawfully. This court addressed this issue in the context of confession cases, and, by implication, in the Fourth Amendment cases in *Michigan* v. *Tucker,* 417 U. S. 433, 95 S. Ct. 2357 (1974) with regard to the concept of deterring unlawful police conduct through the sanction of the suppression of evidence, the Court stated:

> Just as the law does not require that a defendant receive a perfect trial, only a fair one, it cannot realistically require that policemen investigating serious crimes make no errors whatsoever. The pressures of law enforcement and the

8. *Bivens* v. *Six Unknown Narcotics Agents,* 403 U. S. 388 (1971).

9. See *e.g.,* Section 23-2401, *et seq.;* 81-8. 209 *et seq.* RRS Nebraska 1943. See generally: 1973 Suggested Legislation, Council of State Governments, Iron Works Pike, Lexington, K. Y. 40505, p. 214.

> vagaries of human nature would make such an expectation unrealistic. Before we penalize police error, therefore we must consider whether the sanction serves a valid and useful purpose. 417 U. S. at 446, 94 S. Ct. at 2365.

The Court continued:

> The deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent conduct which has deprived the defendant of some rights. By refusing to admit evidence gained as a result of such conduct the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care towards the right of an accused. Where the official action was pursued in complete good faith, however, the deterrence rationale loses much of its force. 417 U. S. at 446, 95 S. Ct. at 2365.

The last sentence in the foregoing quotation makes the precise point that we seek to make herein. Unlike the officer who acts in bad faith and who is undeterred because he simply does not *care* whether or not the evidence is suppressed, the officer who acts in good faith is undeterred by the threat of suppression because he reasonably believes that his actions are, in fact, lawful and that therefore the evidence that he seizes will be admissible in court.

For any concept of deterrence to be effective the person to be deterred must know the nature of the sanction which is supposed to deter him (*i.e.* the suppression of evidence), *and* he must know just what it is that he is doing wrong which will invoke that sanction (*i.e.* making an illegal search and seizure).[10] But if the target of the sanction reasonably and in good

10. By way of analogy, this Court has upheld the principle that lower courts may sanction those who disrupt orderly courtroom activity by various means including gagging and/or shackling, by removal from the courtroom, or by contempt citations. *Illinois* v. *Allen*, 397 U. S. 337 (1970), *Mayberry* v. *Pennsylvania*, 400 U. S. 455 (1971). Inherent in these decisions is the fact that the disruptive party, either an attorney or a party to the case, will, hopefully, be deterred by being advised that his contumacious conduct will not be tolerated and, if he persists, that the sanction will follow with reasonable rapidity. This is how a true deterrence concept should work.

faith believes that he is *not doing* anything wrong (*i.e.* that the search and seizure he is making *is* lawful), then the deterrent aspect of the Exclusionary Rule is nil.

Certainly police officers, even those acting in complete good faith, will make mistakes. As this Court stated in *Tucker, supra,* to expect law enforcement officers not to make any mistakes would be highly unrealistic. Our basic legal concept of restitution dictates that when A mistakenly injures B, B should be compensated. If an officer makes a good faith mistake in a search and seizure case, then the aggrieved party should have a right over against the hiring governmental entity. It would, of course, be outrageous to hold an officer *personally* liable for his mistakes which are made in good faith.[11]

Based on the arguments made herein we submit that, logically, the threat of suppression of evidence will deter neither the police officer who acts in bad faith and does not care if the evidence is suppressed, nor the officer acting in good faith who believes that he is acting properly and that the evidence which he has seized will *not* be suppressed.

Our analysis thus far has dealt with the state of mind of the officer when he is about to make one given search and seizure.

11. Recent cases have held that when a police officer believes in good faith that he has probable cause to make an arrest and/or search, *and* his good faith belief is reasonable, then he should not be held liable for his conduct. *Hill* v. *Rowland*, 472 F. 2d 1374 (4th Cir. 1974).

For example, in the facts of the instant case, it would be an unbelievable miscarriage of justice to hold the Omaha police officers personally liable for "illegal" search and seizure when the trial judge and the learned justices of the Nebraska Supreme Court have all put their seal of approval on those police officers activities. *State* v. *Rice*, 188 Neb. 728, 199 N. W. 2d 480 (1972). Our call for sanctions against police officers personally, rather than the suppression of evidence seized, is strictly limited to those cases in which such officers clearly acted in bad faith.

Any such analysis would be incomplete if we did not address ourselves to the so-called "educational effect" of the Exclusionary Rule, that is, whether it is rational to suppose that the body of Exclusionary Rule case law will teach the great majority of law enforcement officers, who wish, in good faith, to act lawfully, just what it is they can and cannot do.[12]

The law of search and seizure is so extensive and comprehensive that few individuals, no matter how learned in the law they might be, could master it entirely, much less a police officer with a high school education. There are so many conflicting opinions in the law of search and seizure that judges sitting on the same court often cannot agree as to whether a given search was or was not lawful; and police officers who are confronted with search and seizure questions are held to different and conflicting standards of conduct by courts sitting in the same geographical jurisdiction—*e.g.* the instant case in which the Supreme Court of the state of Nebraska held the search to be lawful while the federal courts in Nebraska and the Eighth Circuit held it to be unlawful.

Given this complexity and confusion, it stretches the imagination to postulate very much of an "educational effect" of the Rule, even in one locality, much less on a statewide, regional or national level. Even if the law of search and seizure were reasonably finite, which it clearly is not, the targets of the "educational effects" of the Rule are, for the most part fairly far removed from this effect, whatever it may be.

The Chief Justice, dissenting in *Bivens, supra,* has succinctly summed up the question of the remoteness of the police from the Exclusionary Rule law:

> Whatever educational effect the rule conceivably might have in theory is greatly diminished in fact by the realities of law enforcement work. Policemen do not have the time, inclination, or training to read and grasp the nuances of the appellate opinions that ultimately define the standards of conduct that they are to follow. The issues that these decisions raise often admit of neither easy nor obvious answers, as sharply divided courts on what is or is not reasonable amply demonstrate. Nor can judges, in all candor, forget that opinions sometimes lack helpful clarity. 403 U. S. 388 at 417.

12. Of course, no "educational effect" of the Exclusionary Rule will serve any purpose at all insofar as bad faith police conduct is concerned.

The effect of the remoteness of the actual impact of the Rule is illustrated by the facts in the instant case. *Mapp* v. *Ohio, supra,* was decided in 1961; the search in question took place in 1970. Theoretically, the Omaha police had had nine years of education about search and seizure law at their disposal when they entered Rice's house. They entered the house in good faith believing that they were in full compliance with the law, a belief which was sustained by the highest tribunal of their state. Yet two federal courts disagreed and the issue is now before this Court for final disposition. The Omaha police took the action that they did, not because they were *unwilling* to attempt to conduct themselves properly, but because the complexities and contradictions inherent in the law of search and seizure made it impossible for them to be *certain* whether or not they *were* acting properly. Thus the so-called "educational" effect of the rule was of little educational value to the police and of no deterrent effect.

In addition, the time lapse between the instant that a policeman must take action and the ultimate pronouncement as to the legality or illegality of his action by an appellate court further attenuates any "educational effect" of the rule. Again, to quote from the Chief Justice in *Bivens*:

> The presumed educational effect of judicial opinions is also reduced by the long time lapse—often several years between the original police action and its final judicial evaluation. Given a policeman's pressing responsibilities it would be surprising if he ever becomes aware of the final result after such a delay. 403 U. S. 388, at 417.

It is now almost exactly five years since the Omaha police decided to enter Rice's house. Three separate appellate courts have thus far considered their conduct and the highest court in the land will consider it in this case. Thus, even if this Court should affirm in this case, it is difficult to imagine that, after more than five years, such a decision will be much of a "sharp lesson" even to those Omaha police officers who were actually involved in the case at the time, even less to their counterparts scattered across the country.

The point which we are attempting to make here is to underscore the manner in which the *effectiveness* of the "educational effect" of such a decision, and, as a consequence, its potential deterrent effect, can become attenuated by the "remoteness" factor discussed above. First, we have the remoteness of the presumed target of the "educational effect"—the police officer—because of the lapse of time involved and; second, the remoteness of the police officer from any lessons to be learned in a field of law which is for the most part too complex for him to grasp.

Thus, we submit that the Exclusionary Rule, by definition, canot fulfill its primary purpose, the deterrence of unlawful police conduct. It obviously does not deter bad faith police activities, nor does it deter activities by the police taken in the belief that they are acting within the law. Further no long-range educational effects upon the police from the Rule can be reasonably postulated.

Thus far we have argued against the effectiveness of the Exclusionary Rule, as a deterrent to unlawful police conduct, in general terms, dealing with the entire concept of the Rule itself. We turn now to specifics—to the application of the Rule in the instant case, in order to develop our major point further.

Amicus will not reiterate herein the legal arguments set forth by the State of Nebraska to the effect that the entry by the police into David Rice's house was legal (although we agree with these arguments and wish to associate ourselves with

them). However, since our argument is premised in large measure upon our belief that the officers of the Omaha Police Department were acting in the utmost good faith at all times material to the case, we feel that it is necessary to comment briefly on the characterization of the officers' behavior which was made by the lower court.

The panel opinion of the U. S. Court of Appeals for the Eighth Circuit stated that the Omaha police engaged in a:

> widespread search for the suspects Peak and Poindexter which evidenced a negligent disregard . . . for the constitutional rights of not only Peak and Poindexter but possibly other citizens as well. Such a police search is at least reminiscent of the police conduct condemned in *Lankford* v. *Gelaton*, 364 F. 2d 197 (4th Cir. 1966). We believe that this is an appropriate case for the application of the Exclusionary Rule. 513 F. 2d 1280, at 1295.

Amici submit, with all due respect to the judges of the Eighth Circuit, that this is an extremely unfair characterization of the behavior of the Omaha police officers. The police were faced with a situation in which one policeman had been killed and two others injured in a pre-set dynamite bomb ambush; they were legitimately concerned for the security of the community in general, for their own safety and that of others, and for the safety of the suspect Duane Peak for whom they had an arrest warrant.

Despite the obvious exigencies of the situation the police did *not* engage in wholesale, "dragnet" type activities such as those which were condemned by this Court in *Davis* v. *Mississippi*, 394 U. S. 721 (1969). Rather, they confined their search to four locations (one of which was David Rice's house, the search of which is in question here), each of which had at least a *rational* connection with Peak and Poindexter, the two individuals for whom arrest warrants had been issued.

We are at a loss to understand how this relatively narrow-gauged search can even remotely be compared to the situation

in *Lankford* v. *Gelston, supra,* in which the officers of the Baltimore, Maryland, police department made wholesale, house-to-house searches of some 300 persons' homes based upon unconfirmed and anonymous tips. Certainly, the activities of the Baltimore policemen in *Lankford* v. *Gelston* were examples of the sort of truly errant police conduct which we have described in the foregoing part of this Argument. Equally certainly, we submit, the actions of the Omaha police officers in their search for Peak and Poindexter were clear examples of good faith police activity.

We turn now to the actual question involved in this case, the entry and search of David Rice's house. Again, we emphasize that we are not presenting to this court a detailed analysis of the law of search and seizure as applied to this particular search. We are merely attempting to show that the search was made in the utmost good faith by police officers who were confident that they were complying fully with the law at the time they acted as they did. From this it follows that the good faith actions of the officers *could not have been* deterred by the sanctions of the Exclusionary Rule and that it is highly unlikely that any future "illegal" searches and seizures will be deterred by the application of the Exclusionary Rule to this case.

The Omaha police officers, in their search for Peak and Poindexter, arrived at David Rice's house at about 10:00 p.m. on August 22nd, 1970. Now, we believe that it would be permissible to speculate on what was going on in their minds at this time, in order to present the issue of their good faith in its proper perspective:

1. They believed that since Peak was a ranking member of the National Committee to Combat Fascism, as was Rice, and because Peak had been at Rice's house on prior occasions, that he might then be there. (513 F. 2d 1280 at 1284 (8th Cir. 1975)).
2. At least arguably, according to the opinion of the court below, the police had probable cause, *independent of*

their search for Peak, to search Rice's home. (513 F. 2d 1280 at 1286 (8th Cir. 1975)).

3. From the foregoing facts it is obvious that the arrival of the police at Rice's house was no random happening, no part of any sort of house-to-house, dragnet-type search, but that they had a very legitimate reason for being there.

What then, did the police do? They waited for about an hour at Rice's house in order to secure a search warrant.

What does this indicate about the state of mind of the police at David Rice's house prior to entry? It indicates their absolute good faith beyond any question for the following reasons:

1. *They took the time to obtain a search warrant.* If there is *any* fairly finite rule which may be gleaned from the incredibly complex mass of search and seizure law discussed above, it is that in our system there is a preference for and a high priority placed on the procuring of search warrants before a search is made. *United States* v. *Ventresca,* 380 U. S. 102 (1965); *Katz* v. *U. S.* 389 U. S. 347 (1967). This is what the Omaha police did, and if this action is not conclusive of the good faith of the Omaha police department then it would be almost impossible to prove good faith in *any* search and seizure case.
2. *There was no way for the police even to suspect that their search warrant would later be held to be invalid.* The search warrant for Rice's house was duly issued by a magistrate and was "fair on its face" (*i.e.* there were no patent defects such as a wrong address or that it was issued by a judicial officer without jurisdiction, etc.). Further, in retrospect, the same search warrant was sustained by the trial court and the Nebraska Supreme Court judges whom we must presume are more learned in the law of search and seizure than are

Omaha police officers.[13] Thus there is simply no possibility that the Omaha police officers could have suspected for a moment that they were executing what would later be held to be an invalid piece of process.

3. *It is inconceivable that it would even have remotely occurred to the officers that their taking the necessary hour to secure the search warrant would later be used to destroy the claim that, despite the subsequent invalidity of the warrant, they could have made a lawful warrantless entry and search, at the time they arrived at Rice's house based on the doctrine of "exigent circumstances."* The Omaha police certainly did not take the time to get a search warrant for Rice's house in order to *violate* Rice's rights. Obviously they secured the warrant in order to *protect* his rights. This procedure took about an hour, yet the federal courts ruled, in effect, that, while the warrantless search might have been permissible had the police immediately entered David Rice's house when they got there, the hour that it took the police to secure the warrant vitiated any such a claim. Had the police known this, or even considered their situation in this light, they would, again in complete good faith, have entered Rice's house as soon as they arrived there.

Thus we see the hapless Omaha police department officers whose good faith attempt to act within the confines of the law is about as clear as anything could be, and whose conduct was sustained by their state supreme court, being faced with a review of their conduct by the federal courts which can be characterized as hypertechnical at the very least.

13. Amici concur with the position taken by the State of Nebraska and the Nebraska Supreme Court that, in the circumstances of this case, the search warrant was indeed a valid warrant. *United States* v. *Harris*, 403 U. S. 473 (1971).

In view of the foregoing, what will be the result if the Exclusionary Rule is held by this court to require suppression of the evidence seized from the house of David Rice?[14]

First, an individual who has been convicted of the ambush murder, by dynamite, of an Omaha police officer, and against whom the evidence was overwhelming, will almost assuredly, have to be freed.

Next, the Omaha police officers involved in the search for and seizure of the evidence against Rice will not be punished or deterred in the slightest. They know that they exercised the utmost good faith in attempting to comply with the law, and their value judgments, made at the scene, were sustained by their state Supreme Court, only to be overturned by two federal courts.[15]

The Omaha police may indeed feel *frustrated*. They may ask one another just how, in the circumstances of this case, or in similar cases, they are to go about their duty of protecting the community and themselves; but it is highly unlikely that they will feel chastened or punished by the decision.

Finally, and most importantly, the suppression of the evidence in this case will not serve as some sort of shining beacon to deter future police "misconduct" (if that term can even be used to describe the law enforcement activity in the instant case).

Many police officers will never hear of the case. Even for those that do, the "Rice" case will become another increment in an ever-growing body of law whose complexity, almost by

14. For purposes of brevity we will not discuss the question of the admissibility in evidence of the dynamite particles found in Rice's clothes, because the suppression of this evidence stems directly from the search of his house, which question we have addressed ourselves.

15. In fact, if the Omaha police learn any lesson at all from the suppression of the evidence in this case, that lesson may well tell them to proceed at once, in similar cases, *without* a warrant since their efforts in this case to comply with the law, by obtaining a search warrant, backfired against them by destroying the exigent circumstances argument to justify the search.

definition, makes either an educational effect or a deterrent effect upon the police speculative at best.

This is not to say that the police are going to engage in a concerted course of conduct designed to ignore or to flout the teachings of this Court. It simply means that, the great majority of police officers will not be deterred from taking "illegal" actions when they have no real way of knowing whether their activities are, in fact, "illegal". They will continue to go about their duties, for the most part in good faith, attempting to enforce the criminal law in compliance with what they understand in *very general terms* to be the state of the law which governs their conduct. Most of the law enforcement officers in this country take the view of their jobs which was characterized by Mr. Justice Clark, dissenting in *Chapman* v. *United States*, 316 U. S. 610 (1961):

> Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. *He is anxious to obey the rules that circumscribe his conduct in this field.* 316 U. S. 610 at 622 (emphasis supplied).

We believe that this characterization is accurate. If the police of this country perceive that the courts are taking a realistic attitude towards their problems in dealing with the all too undeniable rise of crime and violence in this country, the police will in turn respond in a responsible and positive manner by conducting themselves as professionally as possible.

As an illustration of this we cite the instance of the response of law enforcement officers to this Court's holding in *Terry* v. *Ohio*, 392 U. S. 1 (1968), that policemen may "stop and frisk" persons in public places who are reasonably suspected of actual or imminent criminal conduct. After *Terry* was decided in 1968 some 3½ years elapsed before this Court was again confronted with another "stop and frisk" case, *Adams* v. *Williams*, 407 U. S. 143 (1972).

One of the *amici*, herein, Americans for Effective Law Enforcement, Inc., filed a brief, *amicus curiae*, in *Adams* v. *Williams* in which we pointed out that, in the years which had transpired between *Terry* and *Adams*, appellate court review of "stop and frisk" cases indicated that no sort of pattern of wholesale police misconduct, pursuant to their newly-granted "stop and frisk" authority, had developed.

We believe that the same considerations are pertinent to our argument herein, *i.e.*, that the police will respond in a responsible and professional manner when the courts are willing to consider the problems facing such officers in their efforts to enforce the criminal law. We therefore quote in this case the argument made by Americans for Effective Law Enforcement, Inc., as *amicus curiae* in *Adams* v. *Williams*:

> In *Terry* v. *Ohio*, the opponents of the stop and frisk procedure argued that the doctrine of stop and frisk would be "judicial abdication to police judgment," and that the courts could not control the procedure since an officer "may always 'reasonably suspect' he is in danger." However, a review of state and federal stop and frisk cases decided on the appellate level during the years 1969, 1970, and 1971 indicates that these dire forebodings did not materialize into facts.
>
> The source of our review of these cases was Nedrud: The Criminal Law[17] (hereafter referred to as Nedrud), a collection of reported appellate criminal law cases which is published as a service for attorneys and others interested in the criminal law which classifies and digests cases of importance in this area. This publication lists: "Detention, Stop and Frisk" as a separate category of cases taken from federal and state reporters. During the years 1969, 1970, and 1971, Nedrud digested 272 cases in the stop and frisk category. Of the 272 cases digested 222 opinions upheld the particular police procedure involved as proper.

17. Nedrud, The Criminal Law, by Duane R. Nedrud and Marguerite D. Oberto. LE Publishers, 612 N. Michigan Avenue, Chicago, Illinois 60611. Volumes for 1969, 1970, and 1971. Sec. A.1.4 "Detention, Stop and Frisk."

In only 50 cases did the courts find that stop and frisk procedures were violative of the Fourth Amendment's guarantee against unreasonable searches and seizures.

These figures, we submit, indicate an extremely high level of proper, non-abusive law enforcement, particularly when it is considered that 1) the police were dealing in a relatively newly defined area of the law enforcement process and 2) most stop and frisk confrontations are made on the spur of the moment in which a police officer has very little time to engage in lengthy considerations about the propriety or impropriety of his acts.

Further, of the fifty cases which were decided against the police, in seventeen of them the courts actually upheld the stop and the initiation of the frisk but ruled the evidence obtained inadmissable because of the *scope* of the frisk. Thus in the final analysis, of the two hundred and twenty-two cases digested in Nedrud, only thirty-three were held to be cases in which the *entire* officer-suspect confrontation was considered to be improper. This produces a ratio of almost 7-1 in favor of police procedures in the stop and frisk area which were sustained.

We believe the same rationale to be applicable to this case. If this Court should hold that, in the facts of this case, evidence which is highly probative and reliable as to the guilt of the defendant should not be excluded, when the police were acting in good faith and where there will be little or no deterrent effect of the exclusion, the police would not utilize this modification of the Exclusionary Rule as an excuse to engage in any sort of concerted conduct of unlawful behavior.

The Chief Justice, in his dissenting opinion in *Bivens, supra,* summed up succinctly the entire issue of the continued viability of the Exclusionary Rule:

> Some clear demonstration of the benefits and effectiveness of the Exclusionary Rule is required to justify it in view of the high price it exacts from society—the release of countless guilty criminals.[18]

18. Bivens, *supra,* at 416.

The only possible "benefit" of the Exclusionary Rule would be that it effectively deterred unlawful police conduct. Even if it *could* be proven that the Exclusionary Rule did so, there could still be a legitimate debate over whether or not even *this* compensated for the "high price it exacts from society" by requiring the release of patently guilty criminals. We submit, however, that logically the Exclusionary Rule does not now, will not in future, and simply *can not* deter unlawful police conduct. Thus the Exclusionary Rule will continue to exact its high price from society with little or no corresponding benefit of any kind except to the guilty criminal.

This case presents this Court with a sound factual basis upon which to evaluate the continued validity of the Exclusionary Rule. We urge the Court to confront the issue squarely and to hold that, at least in cases such as this where complete good faith on the part of the police is shown, and, where there is little or no possibility of any deterrent effect of the application of the Exclusionary Rule, the Rule should be modified, and the opinion of the lower court should be reversed and the evidence seized from respondent Rice should be held to be admissible against him.

II. This Court Should Hold That the Constitutional Validity of the Entry and Search of Respondent's Premises by Omaha Police Officers Under the Circumstances of This Case Is Not a Question Properly Cognizable Under 28 U. S. C. 2254.

This question has been thoroughly covered by the concurring opinion by Mr. Justice Powell in *Schneckloth* v. *Bustamonte,* 412 U. S. 218 at 249. We see no necessity to repeat either the telling legal arguments or the lucid intellectual arguments set forth by Mr. Justice Powell to the effect that the scope of federal habeas corpus review of state criminal convictions should be limited only to those cases in which there is doubt as to the guilt of the petitioner.

We wish to add one brief thought to the arguments made in Justice Powell's concurring opinion in *Schneckloth*. We have attempted to make the point in the foregoing section of this argument that the Exclusionary Rule cannot be an effective deterrent to police misconduct in the search and seizure area. One of the main arguments in support of this point is that the law of search and seizure as applied to the police is so totally complicated, conflicting and confusing that the persons whom the Rule is supposed to deter simply cannot *know* what it is that they are to be deterred from doing.

Much of the complexity, contradiction, and confusion which confront the police in search and seizure questions stems from the fact that even when a given state supreme court makes a definitive pronouncement as to the legality of a certain search and seizure, that determination is now still open to reversal by a single federal judge sitting in review of the determination in a federal habeas corpus proceeding, or on occasion by that judge and, usually, a three-judge panel of a federal circuit court of appeals.

This bifurcated system of review can have no other result but to contribute in a major manner to the confusion of the situation. This has been succinctly pointed out in the *amicus curiae* brief submitted in this case by the State of Arizona, in which the cases of *State* v. *Kasold*, 110 Ariz. 558, 521 P. 2d 990 (1974); 110 Ariz. 563, 523 P. 2d 995 (1974) are discussed. In *Kasold*, after review of the case by three levels of the state judiciary, including the Arizona supreme court, a federal court reversed the findings of the state courts and held that the search and seizure was illegal.

The State of Arizona in its *amicus* brief in this case, rather eloquently presents the position of law enforcement on this issue. Referring to the holding of the federal district court suppressing the evidence in the *Kasold* case, the Attorney General of the State of Arizona stated:

> The result is clear: in a case such as Kasold's it is the opinion of one United States District Judge which counts.

> Decisions of state courts are of no import; appeals in the federal system are futile. The district judge may as well be the magistrate to whom *all* search applications are submitted because his is the ultimate decision. (Emphasis added.)

We concur with this evaluation entirely and point out further, the confusing effect that this uncertainty can have upon the ordinary policeman on the street.

If this court is not minded to confront the issue of the Exclusionary Rule which we urge in part I of this argument, it could make a major stride towards eliminating much of the confusion and complexity for state law enforcement officers involved in the law of search and seizure by holding that final state court decisions on such issues should not be cognizable in a 28 U. S. C. 2254 action unless the question is one of the actual guilt or innocence of the party.

CONCLUSION.

The Exclusionary Rule does not deter unlawful police conduct. This is the primary rationale for the Rule but it has no basis in fact or in logic. The Exclusionary Rule extracts a supremely high price from society by requiring the freeing of countless guilty criminals. This Court should modify the Exclusionary Rule to the extent that, as in the facts of this case, when the police are acting in complete good faith and the suppression of evidence will serve little or no deterrent purpose, evidence seized from a criminal defendant should be admissible against him.

In the alternative this Court should hold that when a state supreme court has made a definitive ruling as to the legality of a given search and seizure, and where the guilt of the defendant

is not in question, such cases should not be cognizable by lower federal courts under 28 U. S. C. 2254.

Respectfully submitted,

FRANK CARRINGTON, Esq.,
FRED E. INBAU, Esq.,
WAYNE W. SCHMIDT, Esq.,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60201,
JAMES R. THOMPSON, Esq.,
WINSTON & STRAWN,
One First National Bank Plaza,
Chicago, Illinois 60603,
JAMES P. MANAK, Esq.,
National District Attorney's Association, Inc.,
211 East Chicago Avenue,
Chicago, Illinois 60611,
Counsel for Amici Curiae.

Of Counsel:
WILLIAM K. LAMBIE, Esq.,
STEPHEN I. MAYO,
ROBERT G. HIGGINS,
Americans for Effective Law Enforcement, Inc.,
960 State National Bank Plaza,
Evanston, Illinois 60601.

Supreme Court, U. S.
FILED
SEP 15 1975
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

No.74-1222

Charles L. Wolff, Jr., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

David L. Rice,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF OF ATTORNEY GENERAL OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Robert L. Shevin
Attorney General of the
State of Florida

Stephen R. Koons
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida 33401

Tel. No. (305) 832-0428

TABLE OF CONTENTS

	Page
Statement of Interest of Amicus State of Florida	2
Argument - Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C., Section 2254.....	3
Conclusion	9

Cases

Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022, reh.den., 404 U.S. 874, 30 L.Ed.2d 120, 92 S.Ct. 26..	4
Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953).....	5
Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973).....	7

TABLE OF CONTENTS

	Page
Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944)	3
Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963)	5
Goham v. Wolff, 471 F.2d 52, (8th Cir. 1974)	7
Harris v. United States, 390 U.S. 234, 19 L.Ed.2d 1067, 88 S.Ct. 992 (1968)	4
Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1964)	5
Picard v. Conner, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971)	8
Tollet v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 93 S.Ct. 1602 (1973)	7
Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782	4

TABLE OF CONTENTS

Miscellaneous

	Page
Nebraska Statutes §29-411 (1943).....	4
28 U.S.C. §2241.....	3
28 U.S.C. §2254.....	3

IN THE
SUPREME COURT OF THE UNITED STATES

No.74-1222

Charles L. Wolff, Jr., Warden,
Nebraska Penal and Correctional Complex,

Petitioner,

vs.

David L. Rice,

Respondent.

On Writ of Certiorari to the United States
Court of Appeals for the Eighth Circuit

BRIEF OF ATTORNEY GENERAL OF THE STATE OF FLORIDA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF AMICUS STATE OF FLORIDA

The Court has ordered the parties to brief the following question:

> "Whether the constitutional validity of the entry and search of respondent's premises by Omaha police officers under the circumstances of this case is a question properly cognizable under 28 U.S.C., Section 2254?" Wolff v. Rice, case no.74-1222, 43 L.W. 3683 (June 24, 1975).

This question regarding the scope and limitations of federal habeas relief is of direct and substantial interest to the Attorney General of Florida. As the chief legal officer of the State of Florida, the undersigned represents the Florida Correctional Institutions in all federal habeas corpus proceedings and in the state appellate courts. Therefore, the undersigned has a vital interest in the maintenance of the proper balance between the federal and state interests. Moreover, the undersigned presently has this issue pending in the Court of Appeals, Fifth Circuit, in Wainwright v. O'Berry, case no.75-2568.

ARGUMENT

WHETHER THE CONSTITUTIONAL VALIDITY OF THE ENTRY AND SEARCH OF RESPONDENT'S PREMISES BY OMAHA POLICE OFFICERS UNDER THE CIRCUMSTANCES OF THIS CASE IS A QUESTION PROPERLY COGNIZABLE UNDER 28 U.S.C., SECTION 2254?

It is too fundamental that federal judges are empowered by 28 U.S.C., Section 2241 to grant writs of habeas corpus to prisoners "in custody in violation of the Constitution or laws or treaties of the United States." In accordance with 28 U.S.C., Section 2254, which codified the rule of Ex parte Hawk, 321 U.S. 114, 64 S.Ct. 448, 88 L.Ed. 572 (1944); habeas corpus may not be granted to a state prisoner unless he "has exhausted the remedies available in the courts of the state."

It is interesting to note that no Nebraska state court ever passed on the validity of a warrantless search. Notwithstanding, the United States Court of Appeals considered the issue and issued the great writ. The Court of Appeals viewed the affidavit upon which the search warrant was issued as defective. The Court thereupon treated the search of the respondent's dwelling as a

warrantless search and issued the writ on that basis.

It is clear that the entry of the house could have been upheld as a search to perfect a valid arrest. (Note: the validity of the arrest warrants were never questioned by respondent.) See: Warden v. Hayden, 387 U.S. 294, 87 S.Ct. 1642, 18 L.Ed.2d 782, where police officers entered a house where a suspected hold up man had entered a few minutes earlier and found defendant pretending to be asleep. While in the house they discovered physical evidence which was admitted into evidence against him. This Court concluded that "they acted reasonably when they entered the house and began to search for a man of the description they had been given and for weapons which he had used in the robbery or might use against them."

Furthermore, Nebraska Statutes authorize entry to execute an arrest warrant. Nebraska Statutes, §29-411, (1943).

Since the entry of the dwelling was proper, the seizure of the evidence, in plain view, was also proper. Coolidge v. New Hampshire, 403 U.S. 443, 29 L.Ed.2d 564, 91 S.Ct. 2022, reh. denied, 404 U.S. 874, 30 L.Ed.2d 120, 92 S.Ct. 26; Harris

v. United States, 390 U.S. 234, 19 L.Ed. 2d 1067, 88 S.Ct. 992 (1968).

The tradition of the state's insistence upon its right to consider the issue in dispute, prior to federal consideration, is well established. See: Daniels v. Allen, 344 U.S. 443, 73 S.Ct. 397, 97 L.Ed. 469 (1953) - failure to timely invoke state appellate jurisdiction.

In Fay v. Noia, 372 U.S. 391, 83 S. Ct. 822, 9 L.Ed.2d 837 (1963), this Court held that a state prisoner convicted of murder in 1942, who did not appeal his conviction but did present his claim of coerced confession at trial, was entitled to habeas corpus relief. But what of the situation where there is also a default at trial which precludes state appellate review?

In Henry v. Mississippi, 379 U.S. 443, 13 L.Ed.2d 408, 85 S.Ct. 564 (1964), this Court held:

> "Only last term, we reaffirmed this principle, holding that a state appellate court's refusal on the ground of mootness, to consider a federal claim, did not preclude our independent determination of the question of mootness; that is itself

a question of federal law which this Court must ultimately decide. Liner v. Jafco, Inc., 375 U.S. 301, 11 L. Ed.2d 347, 84 S.Ct. 391. These cases settle the proposition that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the state's insistence on compliance with its procedural rule serves a legitimate state interest. In every case we must inquire whether the enforcement of a procedural forfeiture serves such a state interest. If it does not, the state procedural rule ought not be permitted to bar vindication of important federal rights. The Mississippi rule requiring contemporaneous objection to the introduction of illegal evidence clearly does serve a legitimate state interest. By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence. If the objection is well taken the fruits of the illegal search may be excluded from jury consideration, and a reversal and new trial avoided" (13 L.Ed.2d 408, at 413)

Since both the State Trial Court and the State Supreme Court found the search warrant valid they had no occasion to consider whether the entry and search would have been valid without a warrant. Therefore, there has been a complete failure to raise the issue of a warrantless search in the state courts. It is clear, therefore, that this Court should remand this case to the Nebraska Supreme Court to consider the issue. See: Goham v. Wolff, 471 F.2d 52 (8th Cir. 1974).

By analogy, this Court has recently held that a habeas corpus petitioner cannot collaterally raise the constitutional issue of the composition of the grand jury where said composition is not in question before or at trial, especially in the context of a guilty plea. Tollett v. Henderson, 411 U.S. 258, 36 L.Ed.2d 235, 93 S.Ct. 1602 (1973). See also, the case of Davis v. United States, 411 U.S. 233, 36 L.Ed.2d 216, 93 S.Ct. 1577 (1973), where this Court also held that a federal prisoner who failed to comply with a federal rule requiring raising of the question of grand jury composition prior to trial, could not raise it in the federal appellate system.

The posture of this case requires this Court to permit the Nebraska state courts an opportunity to consider the merits of the warrantless entry to perfect a valid arrest. Federal incursion at this point is obviously an unwarranted interference, undermining the principle of comity. Picard v. Conner, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).

CONCLUSION

Comity requires this Court to remand this case to permit the State Supreme Court to consider the issue of whether the entry and search without a warrant was proper.

Dated: West Palm Beach, Florida,
August 27, 1975.

Respectfully submitted,

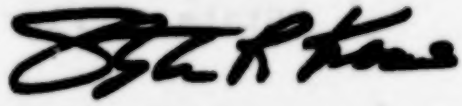
Robert L. Shevin
Attorney General of the
State of Florida

Stephen R. Koons
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida 33401

CERTIFICATE OF SERVICE

I hereby certify that I furnished three (3) copies of the foregoing brief to counsel for petitioner, Assistant Attorney General Melvin Kammerlohr, 2119 State Capitol, Lincoln Nebraska, 68509; and three (3) copies to counsel for respondent, Honorable David L. Hurzog, Attorney at Law, 1431 First National Center, Omaha, Nebraska, 68102, by mail, this the 9th day of September, 1975.

Robert L. Shevin
Attorney General
State of Florida

By 

Stephen R. Koons
Assistant Attorney General
225 Pan American Building
West Palm Beach, Florida
33401

Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Fenal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

LENNOX S. HINDS, Esq.
National Director of
The National Conference
of Black Lawyers
126 West 119th Street
New York, New York 10026
Tel. No. (212) 866-3501

HENRY W. MCGEE, JR.
405 Hilgard Ave.
Los Angeles, California 90024
Tel. No. (213) 825-3843
of Counsel

COCKLE PRINTING CO., 1822 ST. MARY'S AVE., OMAHA

INDEX

Pages

Interest of Amicus Curiae
The National Conference of Black Lawyers 1

Argument:

I. The Fourth Amendment Exclusionary Imperative Applies With Special Force To The Night Search Of A Home On A Warrant With A Manifestly Defective Affidavit and Evidence Thereby Seized Could Not Be Constitutionally Used To Convict Respondent 3

A. Post-*Calandra* Decisions Have Continued To Apply Traditional Exclusionary Doctrine and Affirm The Various Theories Upon Which The Fourth Amendment Right Is Premised 8

B. Post-*Calandra* Academic Discussion Of The Exclusionary Rule Supports Its Retention Within The Framework Of This Court's Prior Decisions 16

II. Resuscitation of Constitutionally Deficient Search Warrants Would Seriously Abridge The Fourth Amendment's Requirement That Judicial Scrutiny Precede Police Intrusion Into Homes and Pose A Special Threat To Unpopular Persons and Causes 26

II. Abandonment Or Significant Modification Of The Exclusionary Rule Will Impact Disproportionately On Minorities and Remove A Major Check On Unlawful Police Conduct Regressively Affecting Law Enforcement 31

Conclusion 38

CASES CITED

Pages

Agnello v. United States, 269 U. S. 20 (1925) 3

Aguilar v. Texas, 378 U.S. 108 (1963) 30

Bivens v. Six Unknown Fed. Narcotics Agents, 403 U. S. 388 (1971) 15, 16

Boyd v. United States, 116 U. S. 616 (1886) 4, 25

Brinegar v. United States, 338 U. S. 160 (1949) 28

Cady v. Dombrowski, 413 U.S. 433 (1973) 4

Calandra v. United States, 414 U.S. 338 (1974) 4, 5, 6, 7, 8, 9, 14, 17

Commonwealth v. Whitaker — Pa. —, 336 A. 2d 603 (1975) 14

Dyas v. Superior Court of Los Angeles County, 11 C. 3d 628, 522 P. 2d 674 (1974) 11, 15

Elkins v. United States, 364 U. S. 206 (1960) 12, 13, 20

Everhart v. State, — Md. —, 337 A. 2d 100 (1975) 15

Gouled v. United States, 255 U. S. 298 (1921) 7

Gustafson v. Florida, 414 U. S. 260 (1973) 12

Johnson v. United States, 333 U. S. 10 (1948) 4, 26

Katz v. United States, 389 U. S. 347 (1967) 13

Kovacs v. Cooper, 336 U. S. 77 (1949) 29

Laird v. Tatum, 408 U. S. 1 (1972) 29

Lankford v. Gelston, 364 F. 2d 197 (4th Cir. 1966) 31

CASES CITED—Continued

Pages

Mapp v. Ohio, 367 U. S. 643 (1961) 5, 7, 8, 10, 15

Michigan v. Tucker, 417 U. S. 433 (1974) 4, 9

Olmstead v. United States, 277 U. S. 438 (1928) 38

People v. Brisendine, 13 C. 3d 528, 531 P. 2d 1099 (1975) 12

People v. Cahan, 44 C. 2d 416, 282 P. 2d 905 (1955) 12

People v. Cantor, 36 N. Y. 2d 106, 324 N. E. 2d 872 (1975) 13

People v. Norman, 14 C. 3d 929, 538 P. 2d 237 (1975) 12

Rice v. Wolff, 513 F. 2d 1280 (8th Cir. 1975) 3

Spinelli v. United States, 393 U. S. 410 (1969) 4, 29

State v. Rice, 188 Neb. 738, 199 N. W. 2d 487 (1972) 28

State v. Coburn, — Mt. —, 530 P. 2d 442 (1974) 12, 13

State v. Timson, 38 Ohio St. 2d 122, 311 N. E. 2d 16 (1974) 13

United States v. Acosta, 501 F. 2d 1330 (1974), affirmed en banc, 509 F. 2d 539 (5th Cir. 1974) 9, 10

United States v. Barragan-Martinez, 504 F. 2d 1155 (9th Cir. 1974) 8, 9

United States v. Belcufine, 508 F. 2d 58 (1st Cir. 1974) 9

CASES CITED—Continued

Pages

United States v. Lefkowitz, 285 U. S. 452 (1932) 15

United States v. Rabinowitz, 339 U. S. 56 (1950) 7, 15

United States v. Robinson, 414 U. S. 218 (1973) 12

United States v. United States District Court, 407 U. S. 297 (1972) 27, 29, 30

Weeks v. United States, 232 U. S. 383 (1914) 10, 23

Whitely v. Warden, 401 U. S. 560 (1971) 30

Wolf v. Colorado, 338 U. S. 25 (1949) 35

RULE CITED

Federal Rule of Criminal Procedure 41 (C) 4

BOOKS CITED

J. Baldwin, Nobody Knows My Name (1962) 35

R. Clark, Crime in America (1970) 38

Y. Kamisar, et al., Modern Criminal Procedure (1974) 16, 35

A. Niederhoff, Behind the Shield: The Police in Urban Society (1967) 34

J. Skolnick, Justice Without Trial (1966) 34

A. Weston, Privacy and Freedom (1967) 29

M. Wolfgang, Crime and Race (1970) 35

BOOKS CITED—Continued

Pages

The Politics of Protest, Violent Aspects of Protest and Confrontation, Vol. 3 (1969) (Staff Report to the National Commission on the Causes and Prevention of Violence) 33

The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Police (1967) 32, 37

Report of the National Advisory Commission on Civil Disorders (1968) 32, 34

ARTICLES CITED

Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349 (1974) 20, 23, 26, 36

Balch, The Police Personality: Fact or Fiction, 63 J. Crim. L. C. & P. S. 106 (1972) 34

Black and Reiss, Patterns of Behavior in Police and Citizen Transactions, Vol. II, Sec. I, Field Surveys III, Studies in Crime and Law Enforcement in Major Metropolitan Areas 33

Canon, Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion, 62 Kent. L. Jour. 681 (1974) 19, 20, 21

Comment, Civilian Complaints of Police Misconduct—Some Answers and More Questions, 48 Temple L. Q. 89 (1974) 31

The Exclusionary Rule, 61 F. R. D. 259 (1973) 32

ARTICLES CITED—Continued

Pages

Note, The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra, 9 Harv. Civ. Rights—Civ. Lib. L. Rev. 598 (1974) 7, 23

Fletcher, Fairness and Utility in Tort Theory, 85 Harv. L. Rev. 537 (1972) 8

Comment, Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule, 20 U. C. L. A. L. Rev. 1129 (1973) 5

Kaplan, The Limits of the Exclusionary Rule, 26 Stanford L. Rev. 1027 (1974) 5, 17, 20

Kaplan, Segregation Litigation and the Schools—Part II: The General Northern Problem, 58 Nw. U. L. Rev. 157 (1963) 31

Levy, Cops in the Ghetto: A Problem of the Police System, 11 American Behaviorial Scientist 31 (March-April, 1968) 34

McGee, Blacks, Due Process and Efficiency, etc., 2 Black L. Jour. 220 (1972) 31

Oaks, Studying the Exclusionary Rule in Search and Seizures, 37 U. Chi. L. Rev. 655 (1970) 5, 17, 18

Comment, On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra, 69 Nw. U. L. Rev. 740 (1974) 6, 18

ARTICLES CITED—Continued

Pages

Piliavan and Briar, Police Encounters with Juveniles, 70 American Journal of Sociology 206 (1964) 33

Schrock and Welsh, Up from Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minn. L. Rev. 251 (1974) 21, 22, 24

Sevilla, The Exclusionary Rule and Police Perjury, 11 San Diego L. Rev. 839 (1974) 23

Spiotto, Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives, 2 J. Legal Studies 243 (1973) 17

Swan, The Politics of Identification: A Perspective of Police Accountability, 20 Crime and Delinquency 119 (1974) 31

Terris, The Role of the Police, 374 Annals of the American Academy of Political and Social Science 61 (1967) 37

Note, United States v. Calandra, 13 Duquesne L. Rev. 107 (1974) 23

Wigmore, Using Evidence Obtained by Illegal Search and Seizure, 8 A. B. A. Jour. 479 (1922) 16

In The

Supreme Court of the United States

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

vs.

DAVID L. RICE,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL CONFERENCE OF BLACK LAWYERS AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The National Conference of Black Lawyers appears as Amicus Curiae with the written consent of both parties, given in letters which have been filed with the Clerk of this Court. The Conference is a national, not-for-profit, non-partisan, non-political membership organization incorporated under the laws of the District of Columbia. Its membership consists of over 1,000 of the nation's 5,000 Black lawyers, judges, and law professors. Also included in its membership are over 2,500 Black law students through the Black American Law Students Association (BALSA). As stated in its Articles of Incorporation, the purposes of NCBL are:

1. To work for the elimination of racism in the law.
2. To give attention to the root problems of the Black Community.
3. To analyze and study problems of Black attorneys in the United States in their legal practices.
4. To encourage Black youth to study law.
5. To cultivate the science of Jurisprudence to facilitate the administration of justice; to elevate the standards of integrity, honor and courtesy in the legal profession; and to cherish the spirit of brotherhood among the members thereof.

In futherance of these objectives, NCBL seeks to represent in our courts, nationwide, through affirmative litigation and criminal defense, the concerns of Black citizens who are the victims of racism and whose constitutionally guaranteed rights are being abrogated.

The Conference appears here because of its conviction that the instant case presents questions the resolution of which will have significant impact on the increasingly deteriorating relationship between the police and the Black communities in our nation's urban areas. The National Advisory Commission on Civil Disorders (The Kerner Commission Report), noted that Black citizens firmly believe that police brutality and harassment occur more frequently in Black neighborhoods as compared to their white counterparts. There is an abundance of literature that substantiates this belief as we discuss infra. If these attitudes are allowed to persist through continued patterns and practices of police misconduct, they invariably will contribute directly to suspicion and disrespect of law enforcement agencies. We believe that a major

objective of the exclusionary rule, though by no means the only objective, as our brief attests, is to deter police conduct in violation of the Fourth Amendment. Thus, the Conference believes that it has a direct interest in the outcome of this case.

———o———

ARGUMENT

I.

The Fourth Amendment Exclusionary Imperative applies with special force to the night search of a home on a warrant with a manifestly defective affidavit and evidence thereby seized could not be constitutionally used to convict respondent.

Chief District Judge Warren K. Urbom, and subsequently the Court of Appeals, properly ruled that the affidavit upon which the search warrant authorizing entry into respondent David L. Rice's home was predicated did "not meet either criterion of the *Aguilar-Spinelli* test". Indeed, the state trial court found that the affidavit, if not rehabilitated by evidence not disclosed to the magistrate, failed . . . "to establish probable cause justifying the search." *Rice v. Wolff*, 513 F. 2d 1280, 1290 n. 4 (1975). Since the premises were respondent's home and the search was during the night, the constitutional requirements apply with special force for "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which

chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States,* 333 U. S. 10, 14 (1948). *See* also *Agnello v. United States,* 269 U. S. 20, 32 (1925); *Cady v. Dombrowski,* 413 U. S. 433, 441-442 (1973). *Cf.* Federal Rule of Criminal Procedure 41 (c).

So clearly correct are the rulings below that petitioner tacitly concedes that the District Judge and the Court of Appeals faithfully heeded this Court's teachings on the constitutional demand that inferences which justify the invasion of a dwelling "be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson v. United States,* 333 U. S. 10, 13-14 (1948), and that the warrant could not be sustained "without diluting important safeguards that assure that the judgment of a disinterested judicial officer will interpose itself between the police and the citizenry." *Spinelli v. United States,* 393 U. S. 410, 419 (1969). (We repeat. Petitioner's Brief is but an extended concession of the patent inadequacy of the warrant. *See* especially Petitioner's Brief, pp. 18 and 19.) Instead, petitioner and amici either misreading or else over-reading this Court's refusal to extend the reach of the exclusionary rule in *Calandra v. United States,* 414 U. S. 338 (1974), and *Michigan v. Tucker,* 417 U. S. 433 (1974), audaciously urges this Court to abdicate its duty to protect Americans against all governmental invasions

> "of the sanctity of a . . . home and the privacies of life and the invasion of [the] indefeasible right of personal security, personal liberty and private property," *Boyd v. United States,* 116 U. S. 616, 630 (1886).

Petitioner would have this Court reject an earnestly developed constitutional jurisprudence, supported by Courts of Appeal and State Supreme Courts as well as scholars (see Argument I (A) and I (B) *infra*), which forbids lawlessness in the conviction of lawbreakers and scorns the government's "failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Mapp v. Ohio,* 367 U. S. 643, 659 (1961). "[I]n the fourth amendment arena, the means by which the Court performs its duty appears to be through satisfying its responsibility under the judicial review/integrity rationale comprehensively to protect ('uphold') a defendant's fourth amendment rights." Comment, *Judicial Integrity and Judicial Review: An Argument for Expanding the Scope of the Exclusionary Rule,* 20 U. C. L. A. L. Rev. 1129, 1155-56 (1973). *See* James Madison's address to the First Congress, June 8, 1789, 1 Annals of Cong. 439 (1834), cited in *United States v. Calandra,* 414 U. S. 338, 356-57 (1974) (Brennan, J., dissenting.), and Oaks, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665, 756 (1970), which points out that "the exclusionary rule provides an occasion for judicial review. . . ." As this Brief shall demonstrate, such an abrupt departure from Fourth Amendment orthodoxy is not supported by the recent decisions of this Court, the decisions of the United States Courts of Appeal and State Supreme Courts, and recent scholarly consideration of this Court's work, even by those concerned, in John Kaplan's phrase, with the "political and enforcement costs of the exclusionary rule." Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027, 1045 (1974).

Surely *United States v. Calandra, supra,* does not warrant the alternatively bold and alarmist assertions that, "[t]he time to end the experiment in our history when heinous criminals go free because of the operation of the exclusionary rule has come . . .; that the exclusionary rule is not working and should be modified," Petitioner's Brief, 35; or that "the present majority on [this] Court is willing to abdicate much of its role in enforcing the restraints of the Constitution in the hope that this will aid in the fight against crime." Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 Nw. U. L. Rev. 740, 797 (1974). (Hereinafter cited as "Spiotto Critique.")

Though some students of the opinion and the dissent suggest that "the commitment of the present majority to judicial supervision of police practices is subject to legitimate doubt," *Spiotto Critique, supra,* at 797, the opinion itself stresses deterrence rather than the judicial integrity or personal rights necessity for exclusion. This no doubt is at least in part due to the ascendance of deterrence as a rationale for the rule and because it was, in the Court's view, more relevant to a resolution of the respondent's attempt to extend the exclusionary rule to grand jury proceedings. Thus it was that the Court weighed the value of deterrence against "the potential injury to the historic role and functions of the grand jury." *Calandra, supra,* 414 U. S. at 349. Instead of seeking undeterminable additional deterrence by permitting the exclusion of tainted evidence from Grand Jury consideration, the Court was concerned that the delay occasioned by suppression hearings might "be fatal to the enforcement of the criminal

law." 414 U. S. at 350. The majority of the Court believed that since in this context "the incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is uncertain at best," ultimate exclusion of evidence at the trial itself would fulfill the deterrence aspects of the exclusionary doctrine. 414 U. S. at 351.

It is of course true that the dissent argued that the Court's single-minded emphasis on deterrence cast doubt on its fidelity to the doctrines of judicial integrity and personal rights which are "the very essence of constitutional liberty," *Gouled v. United States,* 255 U. S. 298, 304 (1921), and which are part of the rich cluster of values which informed the opinion of Mr. Justice Clark in *Mapp v. Ohio, supra.* However, the Court's *Calandra* opinion stresses deterrence as a practical concern rather than developing its relation to the fundamental considerations in which the Fourth Amendment is grounded. Clearly there is no disavowal of the more compelling reasons for the exclusionary rule affirmed by "John Adams' characterization of Otis' argument against search by the police that 'American independence was then and there born.'" *United States v. Rabinowitz,* 339 U. S. 56, 70 (1950) (Frankfurter, J., dissenting.)

But because *Calandra* has caused some commentators to believe that the Court is "preoccupied with judicial efficiency," Note, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra,* 9 Harv. Civ. Rights-Civ. Lib. L. Rev. 598, 622 (1974), the violation of respondent's constitutional right by the Omaha police is an appropriate opportunity for this Court

to once again affirm that the "exclusionary rule is an essential ingredient of the Fourth Amendment," *Mapp, supra,* 367 U. S. at 651, and to ground constitutional adjudication not on "fashionable" instrumental concerns but on values which are ends in themselves. *See* Fletcher, *Fairness and Utility in Tort Theory,* 85 Harv. L. Rev. 537, 538 n. 4 (1972).

A. Post-Calandra decisions have continued to apply traditional exclusionary doctrine and affirm the various theories upon which the Fourth Amendment right is premised.

Petitioner's plea for rejection or substantial modification of the exclusionary rule finds scant support in the decisions of the United States Courts of Appeal or State Supreme Courts. In applying the exclusionary rule, courts have, as required in particular cases, stressed the various theories to justify application of the Fourth Amendment imperative. Thus, as did this Court in *Calandra,* the Ninth Circuit Court of Appeal in *United States v. Barragan-Martinez,* 504 F. 2d 1155 (1974), emphasized the deterrent aspects of the Fourth Amendment exclusion right in suppresing testimony about on-the-scene identification of a defendant who had been unlawfully detained by immigration agents when the car in which he was riding was following a truck which was suspected of carrying smuggled aliens. The court also suppressed subsequent in-court identifications by the witness even though the government contended that the unlawful stop had produced no evidence used against the defendant. Judge Goodwin declared that, "Suppression here clearly serves the purpose of the exclusionary rule—to safeguard Fourth Amendment rights

by deterring future unlawful police conduct. (Citing cases.) By denying the government the use of identifications of *Barragan-Martinez* which flowed directly from the illegal stop of his car, the government presumably will be encouraged not to stop vehicles without at least a founded suspicion that the vehicle's occupants are or have been engaged in criminal conduct." 504 F. 2d at 1157-58. *See* also Chief Judge Coffin's opinion in *United States v. Belcufine,* 508 F. 2d 58 (1st Cir. 1974), which justifies exclusion as a deterrent to false or negligent misstatements in police affidavits supporting search warrants.

United States v. Acosta, 501 F. 2d 1330 (5th Cir. 1974), is a case like respondent's which involves the sufficiency of the information upon which a search warrant was issued. Judge Tuttle, speaking for himself and Judge Wisdom in a judgment subsequently affirmed by an equally divided court *en banc,* 509 F. 2d 539 (1974), answered a dissent by Judge Gee which, in the manner of Petitioner Charles L. Wolff, Jr., misinterpreted *Calandra, supra* and *Tucker, supra,* to mean that the right to exclusion depends upon its deterrent effect alone, by declaring:

> "... [D]ue to the extreme novelty of the view espoused by the dissent that the exclusionary rule is to be balanced against police misconduct on a case-by-case basis, we feel obliged to make a brief comment. Many have critized the utility of the exclusionary rule. These criticisms are familiar and need not be discussed more fully. There can be no doubt that *Weeks v. United States* . . . and *Mapp v. Ohio* . . . control this case. There is no suggestion in either of these two landmark decisions that the exclusionary rule can be ignored if in the opinion of the reviewing court the police conduct was neither wilful nor negligent. The exclusionary rule is a per se, prophylactic measure designed to pro-

> hibit the use of evidence seized in violation of the Fourth Amendment. There is no authority for the proposition that the exclusionary rule is to be balanced against the deterrent effect that exclusion might have on police misconduct in an individual case. The dissent cites no authority for its reliance upon this novel approach." 501 F. 2d at 1334 n. 2.

In *Acosta*, the magistrate himself supplied additional information about the informant's reliability but did not transcribe a recitation of his own information because "it involved my own knowledge and subjective state of mind." 501 F. 2d at 1332. The court held that affidavits which did not meet the requirements of *Aguilar-Spinelli* could not be saved because the issuing magistrate relied upon his own knowledge of the informant obtained in a previous case. Thus, despite the fact that officers applied for a warrant in a case involving "a rather high-level heroin dealer," and even though the magistrate satisfied himself "in a good faith which shines in the record that probable cause existed to believe [the officer and his informant]," (501 F. 2d at 1335, 1337), the Court of Appeals vindicated the defendant's Fourth Amendment right to exclusion.

Far less negligence and guess work and much more "good faith" were involved in *Acosta* than in the case at bar in which the affidavit is plainly and patently defective and there is no evidence at all that the issuing magistrate acted in any way other than as a rubber stamp. The reversal in *Acosta* thus underscores and affirms the right of the defendant to a warrant supported by an affidavit or its contemporaneous and transcribed supplement which meet the demands of *Aguilar-Spinelli* and which is subject to appellate review. So long as the *Acosta* magistrate's personal recollections went unrecorded, the defendant's

Fourth Amendment rights were at the unreviewable assessment of the issuing magistrate and the police with whom he was closeted alone in an *ex parte* proceeding.

As have Courts of Appeal, State High Courts have in recent opinions applied the exclusionary imperative and in doing so have made it clear that deterrence is but one rationale for doing so. In *Dyas v. Superior Court of Los Angeles County*, 11 C. 3d 628, 632, 522 P. 2d 674, 677 (1974), in suppressing a gun discovered concealed on the defendant by a Los Angeles Housing Authority patrolman, California Supreme Court Justice Mosk declared:

> "The two-fold purpose of the exclusionary rule is to deter law enforcement officers from engaging in unconstitutional searches and seizures by removing their incentive to do so, and to relieve the courts from being compelled to participate in such illegal conduct."

Although the uniformed housing authority patrolman was not a policeman, the Court applied the exclusionary rule because despite the claim that he acted as a private citizen, the evidence was seized in the performance of his duty as an officer and employee and agent of the State. What matters, the Court said is whether the patrolman was employed by an agency of government, federal, state or local, whose primary mission is to enforce the law.

Even more aggressive implementation of Fourth Amendment exclusionary protection by the California Supreme Court appears in *People v. Brisendine*, 13 C. 3d 528, 531 P. 2d 1099 (1975), where the court suppressed narcotics found in an opaque plastic bottle and in envelopes in a knapsack. The Court held that although a search of the knapsack itself was proper, a search of the bottle and envelopes found within the knapsack was improper because

they could not possibly have contained weapons nor could they have contained evidence of the crime for which the defendant was arrested—illegally starting a campfire. In reaching a result contrary to this Court's decisions in *United States v. Robinson*, 414 U. S. 218 (1973) and *Gustafson v. Florida*, 414 U. S. 260 (1973), Mr. Justice Mosk spoke of the California court's power to afford greater protections to Californians than required by this Court's construction of Fourth Amendment law. Because of the California's Court pathbreaking affirmation of the Fourth Amendment and its pre-*Mapp* espousal of State level exclusion in *People v. Cahan*, 44 C. 2d 416, 282 P. 2d 905 (1955), its vigorous application of the exclusionary imperative is not a surprise. (As the Appendix to *Elkins v. United States*, 364 U. S. 206, 224-232 (1960) makes clear, California was not alone in anticipating the requirement of *Mapp*.) *See* also a reaffirmation of *Brisendine* and another explicit rejection of *Robinson/Gustafson* in the California Supreme Court's August 6, 1975, opinion by Chief Justice Wright in *People v. Norman*, 14 C. 3d 929, 538 P. 2d 237 (1975).

Other State high courts have also applied the Fourth Amendment with vigor and have eschewed monotheoretical justifications for the protections afforded by the exclusionary imperative. Thus, in State of *Montana v. Coburn*, — Mt. —, 530 P. 2d 442 (1974), even though the narcotics sought to be suppressed were seized by the manager of a McDonald's hamburger restaurant and thus arguably were not the product of unlawful police behavior, the Court held that the judicial integrity doctrine of *Elkins, supra*, forbade use of the evidence in the prosecution. Given the fact that the police had prior knowledge and may have acquiesced in the removal of the narcotics from the work

jacket of the defendant, the Court declared that in "all of the court systems," judges should not "be accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Coburn, supra*, 530 P. 2d at 449, citing *Elkins, supra*, 364 U. S. at 223. Note also that *Coburn* stresses the protection of the right to privacy articulated in *Katz v. United States*, 389 U. S. 347 (1967), as an additional rationale for application of the exclusionary sanction.

In *State v. Timson*, 38 Ohio St. 2d 122, 311 N. E. 2d 16 (1974), the Ohio Supreme Court applied the exclusionary rule to suppress a gun found concealed on the defendant by a deputy sheriff, erroneously advised by another deputy sheriff that a federal warrant existed which justified defendant's arrest. In discussing the good faith of the deputy sheriff in words which strike at the heart of petitioner's contention that the enforcement of respondent's constitutional rights turns on the good faith (or lack thereof) of the Omaha police (*see* petitioner's Brief, pp. 35-38), the Court declared:

> "'This court is ever mindful of the difficult task of our police authorities, and in our decisions weigh every individual constitutional claim in the light of the voluminous responsibilities of our constabulary. However, the holding of this case merely reiterates the long-established law that an individual must ever be protected in his constitutional guarantees, and when a close question presents itself such must be answered in a manner to protect the individual, which individual, in a given instance, may be any one of us.'" 311 N. E. 2d at 21.

In another case involving unlawful possession of a gun, the New York Court of Appeals in *People v. Cantor*, 36 N. Y. 2d 106, 1324 N. E. 2d 872, 365 N. Y. S. 2d 509

(1975), ordered the suppression of the pistol where the frightened defendant drew and pointed it at plainclothes detectives who unlawfully surrounded him. Even though there was no search, and the defendant exhibited the gun of his own volition, the New York court asserted: "The proscription against unreasonable searches and seizures is designed to prevent random, unjustified interference with private citizens . . ., and [c]onstitutional protections do not vanish merely because the victim of the unlawful governmental action fails to perceive the identity of the violator as a police officer." 36 N. Y. 2d at —, 324 N. E. 2d at 876, 365 N. Y. S. 2d at 515. And in *Commonwealth v. Whitaker,* — Pa. —, 336 A. 2d 603 (1975), the Supreme Court of Pennsylvania suppressed a murder case confession because it was the fruit of the defendant's unlawful arrest. While under arrest, the defendant gave police the name of the assailant who then confessed, implicating defendant as his accomplice. Re-arrested, defendant also confessed. Though the confession was to a serious crime, the Court concluded that the demands of the Fourth Amendment forbade police exploitation of the illegal detention, even though *Miranda* warnings preceded both the initial inculpatory statement and the subsequent confession. *Miranda* warnings, the Court held, did not dissipate the taint of the unlawful arrests.

In the interval, therefore, between *Calandra* and this Court's consideration of this cause, federal and state appellate tribunals have continued to apply the exclusionary sanction—in serious cases as well as those involving minor offenses. Some state high courts have explicitly recognized that *Calandra* was limited to the attempt to

extend the exclusionary rule and that the rule applies with unabated force at trial. *See,* for instance, *Everhart v. State of Maryland,* —— Md. ——, 337 A. 2d 100, 116 (1975). Other decisions have construed the rule "liberally to safeguard the right of privacy." *United States v. Lefkowitz,* 285 U. S. 452, 464 (1932). Where the enforcement of the Fourth Amendment has been less enthusiastic, it has been applied, in the words of Mr. Justice Clark of the California Supreme Court, dissenting from what he regarded as an extension of the sanction, with the realization that "the exclusionary rule should probably not be abandoned until the Legislature provides an effective alternative." *Dyas v. Superior Court of Los Angeles County, supra,* 11 C. 3d at 637, 522 P. 2d at 680 (1974). In this exposition of authority we have confined the discussion to the post-*Calandra* period, the decisions prior thereto having been fully discussed and argued previously before this Court. We believe, however, that recent cases demonstrate that *Mapp v. Ohio* is, not yet at least, to use a phrase of Mr. Justice Frankfurter dissenting in *United States v. Rabinowitz,* 339 U. S. 56, 86 (1950), an "outmoded decisio[n] eroded by time." Like Chief Justice Burger, state and federal tribunals seem to be "hesitant to abandon [the exclusionary rule] until some meaningful substitute is developed. . . ." *Bivens v. Six Unknown Fed. Narcotics Agents,* 403 U. S. 388, 415 (1971).

We submit that no meaningful substitute has to this date been devised, and that the proposals in petitioner's Brief, pp. 28-35, are no more than that—proposals. Indeed, petitioner concedes that Nebraska statutes waiving

sovereign immunity "are still undoubtedly deficient," but suggests that this Court either overthrow or drastically modify the exclusionary imperative BEFORE Nebraska—not to speak of the other 49 States and the Congress—replaces the rule with an effective substitute. But in the words of Mr. Chief Justice Burger, "[w]ithout some effective sanction, these protections would constitute little more than rhetoric. . . ." *Bivens, supra,* 403 U. S. at 415. This Court therefore should not deprive Americans of Fourth Amendment protections until Congress and the States heed the call of the Chief Justice in *Bivens, supra,* and provide alternative but equally effective strategies that reasonably promise to insure that, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated. . . ."

B. Post-Calandra academic discussion of the exclusionary rule supports its retention within the framework of this Court's prior decisions.

As the Court knows, as long ago as Dean Wigmore's notorious opposition to the exclusionary rule (*see* Wigmore, *Using Evidence Obtained by Illegal Search and Seizure,* 8 A. B. A. Jour. 479 (1922), there has been a drumfire of criticism of the rule, nearly all of it predicated on suspicions of inefficacy rather than on opposition to the Fourth Amendment itself. This pragmatically oriented dissent has culminated in recent years in an enormous literature. Indeed, in Kamisar, et al.'s *Modern Criminal Procedure,* 189 (1974), some twenty recent articles and books are cited as "expressions of disen-

chantment with the Exclusionary Rule or discussion of the limitations upon its effectiveness." But, perhaps because for every reaction there is a counter-response, since this Court's *Calandra* opinion, several commentators have stressed those aspects of the rule not necessary and undiscussed in *Calandra,* and in doing so have effectively rebutted critics of the exclusionary imperative. At the very least, this literature contradicts the assertion of petitioner's Brief, p. 35, that "even the law review writers, generally law professors, whom one would normally expect to be on the other side of the issue, as illustrated in the commentary and suggestions, in general and for the most part agree that the exclusionary rule is not working and should be modified." We submit to this Court that a number of law professors are just where Petitioner suggests they might be expected to stand—"on the other side of the issue" from petitioner.

Frequently cited criticism of the exclusionary rule is found in Dallin Oak's *Studying the Exclusionary Rule in Search and Seizure,* 37 U. Chi. L. Rev. 665 (1970); subsequent work by his student Spiotto in *Search and Seizure: An Empirical Study of the Exclusionary Rule and its Alternatives,* 2 J. Legal Studies 243 (1973); and in Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027 (1974). Since the empirical work of Oaks and Spiotto has drawn the most attention of opponents of the exclusionary imperative, the recent post-*Calandra* literature has sought to undercut the scientism of the empirical studies. In fact, Oaks himself warned against the seductive appeal of attempting to demonstrate whether the rule "works." In writing about the

inherent limitations of disproving the deterrent effect of exclusion and of his own effort, he said that it represents "the largest fund of information yet assembled on the effect of the exclusionary rule, but . . . obviously fall[s] short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." Oaks, *supra,* at p. 709.

Though Spiotto lacked the self-criticism, not to speak of restraint, of Professor Oaks, his work has drawn its share of criticism too. As one commentator pointed out:

> "One can measure the number of desegregated schools reapportioned legislative districts, or even the frequency with which '*Miranda* warnings' are given by the police. But research on the exclusionary rule is complicated by the inability to observe or measure compliance directly. Compliance with the rule usually amounts to a *non-event* that is not observable—it consists of not conducting illegal searches. Though empiricism is theoretically neutral, the simple fact that some phenomena are more easily measured than others often means that direct observation aids only one side of an evaluation. Such is the case with the exclusionary rule." Comment, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra,* 69 Nw. U. L. Rev. 740, 747-48 (1974), (hereinafter cited as "Spiotto Critique.")

In attacking Spiotto's suggestion that his study indicated " . . . that over a 20-year period in Chicago the proportional number of motions to suppress evidence allegedly obtained illegally increased significantly. This is the opposite result of what would be expected if the rule had been efficacious in deterring police misconduct," The *Spiotto Critique, supra,* at p. 751, suggests that his conclusion is unsound for a variety of reasons:

> "First, it rests on a highly selective interpretation of data which was collected in a somewhat haphazard fashion. Second, the inference upon which the conclusion of the rule's deterrent inefficacy rests is based on a research design which contains a critical mistake regarding the date of the rule's introduction in Illinois. Third, motions to suppress cannot be used as indicators of illegal searches for the type of research question posed by Spiotto."

Professor Bradley C. Canon of the University of Kentucky has also reviewed both the Oaks and Spiotto work as well as several other empirical studies of the exclusionary rule and declared:

> "[T]he evidence heretofore collected which bears on the exclusionary rule's efficacy is insufficient and largely inappropriate. . . . A third weakness in the existing evidence relates not as much to the findings in the . . . material *per se* as to the perspective in which the research was undertaken and the findings featured. Most of the researchers have either sought out evidence of the exclusionary rule's failure or upon finding it they have spotlighted it in their discussions . . . [N]obody has searched for evidence or illustrations of compliance with the Fourth Amendment as a result of the exclusionary rule. . . . [S]ome researchers should have turned the perspective upside down; non-compliance should have been expected as routine while significant changes in police search and seizure should have been considered unusual and noteworthy." Canon, *Is the Exclusionary Rule in Failing Health? Some New Data and a Plea Against a Precipitous Conclusion,* 62 Kent. L. Jour. 681, 698, 701-702 (1974), hereinafter cited as 'Canon.'"

Canon, in fact, suggests that his own findings based in part on police and FBI reports in some forty cities indicate that the exclusionary rule has had a "decided impact

upon the nation's police . . . [and] cast considerable doubt on earlier conclusions that the rule is ineffective in deterring illegal police searches." Canon, *supra,* at pp. 717 and 725. And John Kaplan in his article which is fundamentally antipathetic to the exclusionary imperative argues on the one hand that "the empirical studies to date support the view that the impact of the exclusionary rule on the policeman's on-the-street behavior is minimal," and on the other that, "the rule does seem to have some effect on police behavior." Kaplan, *The Limits of the Exclusionary Rule,* 26 Stanford L. Rev. 1027, 1033 (1974).

The contradiction in Kaplan's observations we believe epitomizes the conflict which exists in the literature on the efficacy of the exclusionary rule. As Professor Anthony Amsterdam observed in the Oliver Wendell Holmes lectures in January of 1974 at the University of Minnesota, Professor Oaks' comprehensive survey indicates "nothing more than that the evidence so far gathered is a standoff, and that the hopes of gathering better evidence in the future are very slim." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 475 n. 593 (1974), (hereinafter cited as "Amsterdam.") We submit that a decade and a half of scholarship after *Elkins v. United States,* 364 U. S. 206 (1960), has done little more than demonstrated that "[s]ince as a practical matter it is never easy to prove a negative, it is hardly likely that conclusive factual data [on the efficacy of the exclusionary rule] could ever be assembled." 364 U. S. at 218. The following remarks by Professor Canon illustrate the futility, if not the constitutional bankruptcy of attempts to prove whether the exclusionary rule "works":

> "It would be folly to base decisions to continue or abandon momentous policies on a story from city X or a single data tabulation from city Y. To do so would subordinate a broad and dispassionate consideration of justice to reactive attitudes to what could be dramatic and relatively rare phenomena; . . . [A]s should be the case in all important questions of public policy, such a decision [should] be based on as large a quantity of reliable and valid information as can reasonably be obtained. This is particularly the case where constitutional policies are involved. By definition as well as by tradition, such policies should be stable. Stability should not be equated with inflexibility. But stability does mean that constitutional policies should be more than mere reflections of prevailing ideological winds, and it suggests that the consideration which goes into the promulgation of these policies extends beyond casual or emotional reaction to particular events or short-term political pressures." Canon, supra at pp. 697 and 726.

Fortunately, not all of the scholars have been busy counting motions to suppress. Recent literature—perhaps in response to the mono-dimensional analysis of *Calandra* (which we concede was perhaps all that was necessary to avoid extending the exclusionary rule) affirms the entire cluster of values enshrined in what we have at times in this Brief described as *Mapp's* "exclusionary imperative." As Professors Thomas S. Schrock and Robert C. Welsh of the University of California, Santa Barbara, declare in their recent, and we think, monumental article, *Up from Calandra: The Exclusionary Rule as a Constitutional Requirement,* 59 Minn. L. Rev. 251, 379, 373-74 (1974), (hereinafter cited as "Constitutional Requirement"):

". . . Pragmatic experiment does not compel respect. If people are to accept exclusion, they must be approached neither as witnesses to judicial manipulation of the police, nor as incipient vigilantes whose favor must be curried by the courts, but as fellow citizens ready to consider and perhaps to accept and respect an exclusionary holding—as long as the ground of the decision is more than the court's own fiat. As we have argued, that ground is the defendant's exclusionary right, . . . [The exclusionary rule] is just another term for (1) having the court in one's case respect the security of one's person, house, papers, effects, and privacy, by declining to participate in an illicit evidentiary transaction—the Fourth Amendment here understood as performing its duty-imposing function of obligating the courts to eschew that transaction; and (2) having the court in recognition of its duty to sanction only valid governmental acts, invalidate executive misconduct by excluding the products of that misconduct from one's trial—the Fourth Amendment here understood as one among many power-conferring and power-limiting rules of recognition. At stake here is the individual's right to have the court apply the relevant rules of recognition, which is, in turn, a specification of his more general right to have the government obey its own laws in the prosecution of him. The subject is the individual's right to enjoy the rule of law, and the government's duty to afford it—a right and duty presumably guaranteed by the due process clauses and not to be neglected because of the more fashionable preoccupation with privacy."

Schrock and Welsh devote much of their article to a critique of both the deterrence and judicial integrity arguments for exclusion and opt forcefully for a rationale grounded in "a personal constitutional right to exclusion. . . ." *Constitutional Requirement, supra,* at p. 272. The personal rights or purposeful-normative dimension to the

exclusionary rule has found expression elsewhere in the post-*Calandra* literature. *See,* for example, Sevilla, *The Exclusionary Rule and Police Perjury,* 11 San Diego L. Rev. 839 (1974); and Note, *United States v. Calandra,* 13 Duquesne Law Rev. 107, 110, 113-114 (1974). And in Note, *The Fourth Amendment Exclusionary Rule in the Grand Jury Setting: United States v. Calandra,* 9 Harv. Civ. Lib.-Civ. Rights L. Rev. 598, 619, 601 (1974) though conceding that so long as the exclusionary rule is rooted in "the unstable ground of deterrence theory, empirical analysis of the rule in operation becomes increasingly important," the author makes it clear that the exclusionary rule as portrayed in *Weeks v. United States,* 232 U. S. 383 (1914) "was essential to the preservation of the integrity of the judicial process, . . . [a concern that was] coupled with a view that an exclusionary rule was an essential ingredient of the search victim's personal fourth amendment right of privacy." Admitting that deterrence has been stressed in decisions since *Elkins,* the author suggests that all three rationales for the rule retained "some vitality" until *Calandra,* which the author views "as the culmination of efforts to develop an effective procedural limitation on the exclusionary rule." *Id.* at 603, 613.

Whatever view or views retain "vitality" as a theoretical justification for the rule, we believe Professor Amsterdam makes a point, essentially political in the grand sense of the word, which ultimately captures what the Fourth Amendment *and* its exclusionary imperative is all about:

". . . [T]he authors of the Bill of Rights had known oppressive government. I believe they meant to erect

every safeguard against it. I believe they meant to guarantee to their survivors the right to live as free from every interference of government agents as our condition would permit. And, to this end, it seems to me that the guarantee against unreasonable searches and seizures was written and should be read to assure that any and every form of such interference is at least regulated by fundamental law so that it may be 'restrained within proper bounds.' . . .

"The ultimate question . . . is whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Amsterdam, at pp. 400 and 403.

As Schrock and Welsh argue it may well be that "Amsterdam makes the amendment over in the image of the exclusionary rule . . . understood according to deterrence premises that is the image." While he is a foe of what we might term bare deterrence theory, he does nevertheless as Schrock and Welsh indicate, use deterrence theory as one which "ascribes to the exclusionary rule the purpose of controlling the police rather than the purpose of avoiding judicial furtherance of governmental wrongdoing. . . . [I]t is clear that Amsterdam's 'regulatory' theory is simply a systematized species of [the] deterrence genus." *Constitutional Requirement,* supra at p. 275, n. 78.

Amsterdam's view is thus we submit closer to that of most of the members of this Court in his merging of the different emphases of *Weeks, Elkins* and *Mapp* so that his exclusionary rule protects citizens against police conduct which ultimately erodes the constitutional order.

Despite the fact, for instance, that he concretely affirms both senses of the judicial integrity rationale ("If [the court] receives the products of . . . searches and seizures without regard to their constitutionality and uses them as the means of convicting people whom the officer conceives it to be his job to get convicted, it is not merely tolerating but inducing unconstitutional searches and seizures." Amsterdam, *supra* at p. 432), he sees the rule, as have recent opinions of this court, as "calculated to prevent, not repair." *Elkins, supra,* 364 U. S. at 217. Though we urge this Court to endorse the promise of *Boyd v. United States,* 116 U. S. 616, 630 (1886), that the Fourth Amendment expresses "the very essence of constitutional liberty and security" and that the essence of a violation of the guarantee "is the invasion of [the] indefeasible right of personal security, personal liberty and private property," we concede that the momentum of the contemporary movement to enhance governmental power makes Amsterdam's characterization of the *Boyd* view as somewhat "extreme" perhaps closer to the realities of a nation growing accustomed to "the sprawling, mass-producing, self-perpetuating systems of spies and informers spawned by a professional police investigating 'vice' and supposed subversion. . . ." Amsterdam, *supra* at pp. 432 and 401. We thus close this discussion of recent academic consideration of the exclusionary imperative with his words:

"I am not suggesting that the exclusionary rule is an explicit command of the Constitution, nor do I mean to make more of the Fourth Amendment's language than the skin of the living thought that dwells within. The rule was fashioned by judges as an expression

of that thought. What the Constitution does command is that the administration of the system of criminal justice be so ordered as not to produce incentives toward unreasonable search and seizure which it is not fully capable of restraining. Unless and until a far better system of restraints is devised and put into effective operation than we now have or can soon anticipate, the exclusionary sanction is the only way to honor that command." Amsterdam, *supra* at p. 433.

II.

Resuscitation of constitutionally deficient search warrants would seriously abridge the Fourth Amendment's requirement that judicial scrutiny precede police intrusion into homes and pose a special threat to unpopular persons and causes.

At the outset, we reject the euphemism "rehabilitation" with which petitioner characterizes the bold and regressive contention that search warrant affidavits be amended after the warrant has issued and the police have invaded the citizen's home. Adoption of petitioner's proposal would seriously dilute the Fourth Amendment's warrant requirement. The reinforcing or solidifying connotations of the word "rehabilitation" are entirely misleading. Petitioner in fact seeks the excision of an important constitutional safeguard.

In *Johnson v. United States,* 333 U. S. 10, 15 (1948), the Supreme Court reversed a conviction based upon illegally seized evidence, emphasizing the failure of the officers to fulfill "the constitutional duty of presenting their evidence to a magistrate. . . ." This Court has consistent-

ly reaffirmed the *Johnson* principle, evincing an unyielding hostility to searches without warrants and probers without probable cause. Stressing the need for continued adherence to the warrant requirement, even with national security in the balance, the Court said "[p]rior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights." *United States v. United States District Court,* 407 U. S. 297, 318 (1972). The Court was aware of the political sensitivity of some criminal investigations and warned that "unreviewed executive discretion may yield too readily to pressures to obtain incriminating evidence and overlook potential invasions of privacy and free speech." 407 U. S. at 317.

In view of this Court's frequently expressed fidelity to the Fourth Amendment warrant requirement, the overhaul urged by petitioner affronts contemporary search and seizure doctrine. The implications of the so-called "rehabilitation" doctrine, which hereinafter we shall describe more properly as the resuscitation doctrine, are pervasive. Magistrates, whose detached scrutiny now serves as a shield against unwarranted violations of privacy, would become clerks, their determinative functions essentially usurped by the chimera of an eventual review where additional information about probable cause might—or might not—be introduced. If a haphazard affidavit was subject to ex post facto supplementation in defense of a defectively warranted search, the "oath or affirmation" provision of the Fourth Amendment would in effect be amended to read "oath, affirmation, or hindsight." Police officers would be encouraged to make, and magistrates encouraged to approve careless, incomplete,

or deliberately mal-fashioned warrant applications, secure in the knowledge that second-chance probable cause hearings at which new and untested findings were introduced, might well compound previous violations of the Constitution. "And we must remember that the authority we concede to conduct searches and seizures . . . may be exercised by the most unfit and ruthless officers as well as by the fit and responsible, and resorted to in case of petty misdemeanors as well as in the gravest felonies." *Brinegar v. United States,* 338 U. S. 160, 182 (1949) (Jackson, J., dissenting).

A second and equally dangerous consequence of resuscitation is that it would work with marked severity against political or social groups whose activities and remarks, though protected by the First Amendment, have attracted the attention of law enforcement agencies. It is indeed of consequence that in this case the warrant was largely predicated upon respondent's political utterances and his membership in the National Committee to Combat Fascism (A. 9). The unconstitutional resuscitation hearing transgressed the same First Amendment ground. The prosecution, relying on a file on respondent and his organization (A. 15), offered evidence of statements in NCCF newsletters (A. 15-16), respondent's status in the organization (A. 16, 44), and his statements of opinion as to the timeliness of the crime. (*State v. Rice,* 188 Neb. 738-739, 199 N. W. 2d 487-488 (1972)). Without doubt, the actions of the Omaha police in this case underscore the importance of Mr. Justice Powell's observation that, "Fourth Amendment protections become all the more necessary when the targets of official surveillance may be

those suspected of unorthodoxy in their political beliefs." *United States v. United States District Court,* 407 U. S. 297, 314 (1972).

The increasing tendency—and technological sophistication—of law enforcement authorities in monitoring groups suspected of advocating or planning disruptions of the social order is, of course, well known. *See* generally A. Weston, *Privacy and Freedom* (1967) and *Laird v. Tatum,* 408 U. S. 1 (1972). We contend that resuscitation will most likely occur when files and dossiers are stuffed with bits and pieces of information, much of it no better "than a casual rumor circulating in the underworld." *Spinelli v. United States,* 393 U. S. 410, 416 (1969). Indeed, only in such circumstances will the prosecution be able to adduce supplementary materials in search of probable cause and claim that the police possessed but did not adduce such materials in the application for the warrant.

Resuscitation, then, becomes a weapon primarily for use against groups or individuals who have incurred political or social disfavor. This totalitarian variety anti-crime weapon is not only hostile to the Fourth Amendment but undercuts the guarantees of the First Amendment as well. Under a resuscitation regime, those who exercise First Amendment freedoms will no longer find them holding a "preferred position," *Kovacs v. Cooper,* 336 U. S. 77, 88 (1949), but instead will exercise them in the dread that today's protected statement may be the pretext for the next midnight's search.

Despite our assertion that resuscitation ultimately "chills" the exercise of First Amendment rights, we stress most of all the concept's incompatibility with the Fourth Amendment. Twice this Court has made specific mention of the possibility that defective warrants might be resuscitated by additional information known to the police but not disclosed to the magistrate. Twice this Court has rejected the idea. In *Aguilar v. Texas,* 378 U. S. 108, 109 n. 1 (1963), Mr. Justice Goldberg observed: "It is elementary that in passing on the validity of a warrant, the reviewing court may consider only information brought to the magistrate's attention."

Rejecting resuscitation again in *Whitely v. Warden,* 401 U. S. 560, 565 n. 8 (1971), the Court declared: "Under the cases of this Court, an otherwise insufficient affidavit cannot be rehabilitated by testimony concerning information possessed by the affiant when he sought the warrant but not disclosed to the issuing magistrate. . . . A contrary rule would, of course, render the warrant requirements of the Fourth Amendment meaningless."

The constitutional doctrine mandating previous rejection of the "rehabilitation" concept has vitality today. "The warrant clause of the Fourth Amendment is not dead language." *United States v. United States District Court, supra* at 315. We respectively urge that yielding to the temptation of resuscitation would constitute a giant step towards the demise of the protection the Constitution affords against searches and seizures without probable cause.

III.

Abandonment or significant modification of the exclusionary rule will impact disproportionately on minorities and remove a major check on unlawful police conduct regressively affecting law enforcement.

Racial minorities have traditionally looked to this Court for some measure of protection, and as one scholar has said, there is "some historical support" for a claim by Blacks for "a place as special ward of the Constitution." Kaplan, *Segregation Litigation and the Schools —Part II: The General Northern Problem,* 58 Nw. U. L. Rev. 157, 186 (1963). See McGee, *Blacks, Due Process, and Efficiency, etc.,* 2 Black Law J. 220 n. 4 (1972). This is certainly still true today in a hostile social-cultural order of which police brutality and misconduct is, in the view of minority groups, but the cutting edge, a world in which policemen are the "enemy who protects only the white power structure." Comment, *Civilian Complaints of Police Misconduct—Some Answers and More Questions,* 48 Temple L. Q. 89, 107 (1974). See Swan, *The Politics of Identification, etc.,* 20 Crime and Delinq. 119 (1974).

While this Court has not typically discussed Fourth Amendment protections in the context of racial conflict, the problem is not without judicial discussion. *See* for instance, *Lankford v. Gelston,* 364 F. 2d 197 (4th Cir. 1966). Clearly Fourth Amendment litigation is relevant to "[t]he policeman in the ghetto [who] is the most visible symbol, finally, of a society from which many ghetto

Negroes are increasingly alienated." *Report of the National Advisory Commission on Civil Disorders,* 157 (1968). As John J. Flynn of the Phoenix Bar and counsel of record in *Miranda v. Arizona* observed at the 1972 Judicial Conference of the United States Court of Appeals for the Ninth Circuit:

> ". . . [S]earch and seizure cases arise not on the North Shore of Chicago but in the ghettos of Chicago. The people that are searched and the people who have evidence seized from them are not the persons [at the judicial conference], but they are the persons who need the most protection from the courts, the persons whom the court has said must have effective assistance of counsel, the persons who are already in sore conflict with the police department.
>
> "It is now suggested that the police be unshackled in those areas to make indiscriminate searches, to be allowed to enter those homes, with the thought that those persons who would never sue a police officer can seek compensatory damages. It is not their nature, and they have not and they will not. But it is not your home and my home which will be subjected to the unlawful search and seizure, and the only deterrent and the only protection for those people is if the court says, 'If you bring that evidence to court, it will not be admitted in evidence against this defendant or these defendants.'" *The Exclusionary Rule,* 61 F. R. D. 259, 283 (1973).

The President's Commission on Law Enforcement's Task Force Report: The Police, 198 (1967) (hereinafter cited as "Task Force: Police"), indicates that "except where the exclusionary rule has been applied, judicial influence [upon police behavior] has not been substantial." Should this Court abandon or substantially modify the exclusionary rule, it would in effect leave minority groups

at the mercy of those elements in the police who are, to put it mildly, anti-Black. One study in a 450,000 inhabitant city of a "highly select group of officers" in a department "noted within the community it served and among law-enforcement officials everywhere for the honesty and superior quality of its personnel," discovered that "eighteen of twenty-seven officers interviewed openly admitted a dislike for Negroes." Piliavin and Briar, *Police Encounters With Juveniles,* 70 American Journal of Sociology 206, 207, 212 (1964). Another celebrated study obtained through direct observation of police-citizen encounters in Boston, Chicago, and Washington during a seven-week period in the summer of 1966 revealed that the "great majority of white officers" held anti-Black attitudes.

> "In the predominantly Negro precincts, over three-fourths of the white policeman expressed prejudiced or highly prejudiced sentiments toward members of the Negro race . . . Only 1 per cent expressed attitudes sympathetic toward Negroes. A larger proportion of officers verbalized 'highly prejudiced' attitudes in the heavily Negro precincts than did officers in either of the other two kinds of racially populated areas." Black and Reiss, *Patterns of Behavior in Police and Citizen Transactions,* Vol. II, Sec. 1, p. 136, *Field Surveys III, Studies in Crime and Law Enforcement in Major Metropolitan Areas,* (1967).

It borders, therefore, on understatement, to say that "studies of the police reveal unanimity in findings on this point: the majority of rank and file policemen are hostile toward Black people." 3 *The Politics of Protest, etc.,* 184 (1969) (A staff report to the National Commission on the Causes and Prevention of Violence). *See* also:

J. Skolnick, *Justice Without Trial* (1966); A. Niederhoffer, *Behind the Shield: The Police in Urban Society* (1967); and B. Levy, *Cops in the Ghetto: A Problem of the Police System,* 11 American Behavioral Scientist 31 (March-April, 1968); and Balch, *The Police Personality: Fact or Fiction;* 63 J. Crim. L. C. & P. S. 106, 117-119 (1972).

Black response to this hostility is not difficult to imagine. As the Kerner Commission Report declared at page 157:

> ". . . [D]eep hostility between police and ghetto communities [was] a primary cause of the disorders surveyed by the Commission. In Newark, Detroit, Watts, and Harlem—in practically every city that has experienced racial disruption since the summer of 1964, abrasive relationships between police and Negroes and other minority groups have been a major source or grievance, tension and, ultimately, disorder."

At the risk of belaboring what by now to any fair-minded and educated American must be obvious, we offer the words of the celebrated Black novelist James Baldwin which we believe sum up eloquently the tragedy of contemporary America:

> ". . . The only way to police a ghetto is to be oppressive. None of the Police Commissioner's men, even with the best will in the world, have any way of understanding the lives led by the people; they swagger about in twos and threes patrolling. Their very presence is an insult, and it would be, even if they spent their entire day feeding gumdrops to children. They represent the force of the white world, and that world's real intentions are, simply, for that world's criminal profit and ease, to keep the Black man corralled up here, in his place. The badge, the gun in the holster, and the swinging club, make vivid what will happen should his rebellion become overt . . .
>
> "It is hard, on the other hand, to blame the policeman, blank, goodnatured, thoughtless, and insuperably innocent, for being such a perfect representative of the people he serves. He, too, believes in good intentions and is astounded and offended when they are not taken for the deed. He has never, himself, done anything for which to be hated—which of us has? And yet he is facing, daily and nightly, the people who would gladly see him dead, and he knows it. There is no way for him not to know it: There are few things under heaven more un-nerving than the silent, accumulating contempt and hatred of a people. He moves through Harlem, therefore, like an occupying soldier in a bitterly hostile country; which is precisely what, and where he is, and is the reason he walks in twos and threes." J. Baldwin, *Nobody Knows My Name,* 65-67 (1962).

We therefore implore this Court to retain the exclusionary imperative as a major barrier to police misconduct in minority communities. Other remedies have ranged from ineffective to useless. Distinguished criminologist Marvin Wolfgang, in his influential *Crime and Race,* 72 (1970), has said: "Two striking facts emerge from the few studies and reports of civilian review boards: (1) many more blacks than whites report instances of police misconduct to the boards; (2) few of the cases reported result in sanctions against the police." As Kamisar and his colleagues summarize the situation: "Criminal prosecutions and civil suits have generally proved to be ineffective . . ." Kamisar et al., *Modern Criminal Procedure,* 197 (1974). *See* also the discussion of the "deceptive alternatives" to the exclusionary sanc-

tion by Mr. Justice Murphy, dissenting in *Wolf v. Colorado,* 338 U. S. 25, 41 (1949). Professor Amsterdam, no unthinking proponent of exclusion and indeed one who has called for its supplement through police department rules and regulations, has stressed:

> "Maintenance of the exclusionary sanction would, at the least, provide recurrent occasions for reconsideration of the rules by both the courts and the police themselves—necessary occasions, I believe, if constitutional deficiencies, administrative problems, and practices of evasion are to be flushed out and corrected. The sanction would also probably provide the only available incentive to the police to make the rules, make them clear and make them a part of recruit and in-service training." Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minnesota L. Rev. 349, 429 (1974).

Need we say finally, that more hangs in the balance than the civil rights of racial minorities. As Bruce J. Terris has said:

> ". . . [I]mproved police-community relations are essential not only to minority groups. They are equally important to the police and to the entire community. The police simply cannot operate effectively as long as they are viewed with skepticism or hostility by much of the population in large sections of the city. Such attitudes are often not reported, that witnesses often refuse to identify themselves or to testify in court, and that suspects resist arrest with the tacit or even physical support of bystanders.
>
> "Police officers do their work with the consciousness that they are distrusted or hated by many of the people they see or talk to; they are frequently taunted or cursed; they are sometimes physically attacked . . . [T]his hostility has a marked effect on the morale of police departments, and therefore on their effectiveness as organizations, their efforts to recruit new officers, and their ability to retain existing officers." Terris, *The Role of the Police,* 374 Annals of the American Academy of Political and Social Science 61-62 (1967).

It is by now more than clear that "[p]oor police-community relations adversely affect the ability of the police to prevent crime and apprehend criminals." *Task Force: Police, supra,* at p. 144. In the first place, in a community hostile to police, crimes frequently go unreported. A St. Louis study found that 43 percent of Blacks believed that most city residents were afraid to contact the police. *Id.* If the crime is reported, citizen cooperation in its solution—often indispensible to a successful result—is more often than not withheld.

Moreover, police field operations suffer where police are reluctant to act, or else over-react. "When unfriendly crowds begin to gather, officers will necessarily have to call for reinforcements and use greater force to secure the offender and control the onlookers." *Id.* at p. 145. Indeed, the sheer physical safety of police may be jeopardized in an atmosphere of hostility to the police. "[M]any of the minor assaults (and some of the more serious ones as well) result, at least partially from general hostility toward the police." *Id.*

Rather than casting aside the exclusionary rule in order to "un-handcuff the police," we believe that rejection or meaningful modification of the rule will exacerbate minority group-police conflict and make law enforcement more difficult than it already is. While clearly mere heeding of the teachings of this Court in the law of search and seizure is but the beginning of effective police-com-

munity relations, and other strategies such as proper recruitment and in-service training must play a vital, indeed ultimate role in up-grading police practices (*see* R. Clark, *Crime in America,* 132-150 (1970); judicial review of police behavior through use of the exclusionary rule is influential in conforming police behavior to civilized standards. Here, indeed, "the government is the potent, the omnipresent teacher." *Olmstead v. United States,* 277 U. S. 438, 485 (1928) (Brandeis, J., dissenting).

CONCLUSION

The National Conference of Black Lawyers very respectfully urges this Court to affirm the decisions of the Court of Appeals and the Chief District Judge. Both courts assiduously followed to the very letter, not only the actual holdings of the precedents that control this cause, but also acted in the highest tradition of the federal judiciary in protecting Constitutional rights in a case involving an unpopular defendant. The exclusionary rule is a dramatic example of the American commitment to equal justice and personal liberty. Its rejection in this case would deal a serious blow to racial minorities who earnestly need and seek the protection of the Federal judiciary in their quest for full citizenship. The National Conference of Black Lawyers affirms the need for effective law enforcement in the context of respect for the dignity of the human personality and reverence for law, but urges that rejection or substantial modification of the exclusionary

rule would be a signal to regressive sectors of our society that this Court sanctions a "no holds barred" approach to police work.

Dated: Los Angeles, California, September 12, 1975.

Respectfully submitted,

LENNOX S. HINDS
The National Conference of Black Lawyers
Amicus Curiae
126 West 119th Street
New York, New York 10026

HENRY W. McGEE, JR.
405 Hilgard Avenue
Los Angeles, California 90024
of Counsel

Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

**CHARLES L. WOLFF, JR., WARDEN
NEBRASKA PENAL AND CORRECTIONAL COMPLEX,**

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

THEODORE A. GOTTFRIED
BRUCE STRATTON
ROBERT E. DAVISON
Office of the State Appellate Defender
300 East Monroe Street, Suite 100
Springfield, Illinois 62701

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
2100 M Street, N.W.
Washington, D. C.
1155 East 60th Street
Chicago, Illinois

Midwest Law Printing Co., Chicago 60601, Financial 6-3988

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES i

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENTS:

I.

This Court Should Support The Right Of Privacy And Uphold Judicial Integrity By Affirming The Decision Of The Court Of Appeals 4

II.

Allowing Additional Facts To Be Presented At A Suppression Hearing To Validate The Original Affidavit For A Search Warrant Is Contrary To The Express Language Of The Fourth Amendment And Contrary To The Purpose For The Warrant Requirement 15

III.

This Court Should Not Inhibit The Enforcement Of Fourth Amendment Rights By Limiting The Relief Presently Available Under 28 U.S.C. §2254 .. 20

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Agnello v. United States, 269 U.S. 20 (1925) 18

Beck v. Ohio, 379 U.S. 89 (1964) 14, 18

Boyd v. United States, 116 U.S. 616 (1886) 6, 7, 12, 17, 21

Bramlett v. Peterson, 307 F.Supp. 1311 (M.D. Fla. 1969) 23

Camara v. Municipal Court, 387 U.S. 523 (1967) 17

Chimel v. California, 395 U.S. 752 (1969) 17

Coolidge v. New Hampshire, 403 U.S. 443 (1971) 17, 18

Entick v. Carrington, 19 Howell's State Trials 1029 (1765) 5

Henry v. United States, 361 U.S. 98, 102 (1959) 14

Johnson v. United States, 338 U.S. 10 (1948) 17, 18

Jones v. United States, 357 U.S. 498 (1958) 18

Katz v. United States, 389 U.S. 347 (1967) 17, 18

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 20

Mancusi v. DeForte, 392 U.S. 364 (1968) 16

Mapp v. Ohio, 367 U.S. 643 (1961) 8, 13

McDonald v. United States, 335 U.S. 451 (1948) 17

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 17, 20

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 16

Stanford v. Texas, 379 U.S. 476 (1965) 5

Steadman v. Duff, 302 F.Supp. 313 (M.D. Fla. 1969) 22

Terry v. Ohio, 392 U.S. 1 (1967) 9

United States v. United States District Court, 407 U.S. 297 (1972) 16, 19

Vale v. Louisiana, 399 U.S. 30 (1970) 18

Weeks v. United States, 232 U.S. 383 (1914) 7

Whiteley v. Warden, 401 U.S. 560 (1971) 17

Wolf v. Colorado, 338 U.S. 25 (1949) 12, 17

Wolff v. Rice, 513 F.2d 1280, 8 Circuit (1975) 10

Texts and Articles

1 Cooley, Constitutional Limitations, 610-15 (1927) 5, 6

Kaplan, Search and Seizure: A No Man's Land in Criminal Law, 49 California Law Review 474 (1961) 5

Schrock and Welsh, Up from Calandra; The Exclusionary Rule as a Constitutional Requirement, 59 Minnesota Law Review 251 (258) (1974) 10

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. of Ch. L.R. 665 (1970) 13

Traynor, Mapp v. Ohio at Large in the Fifty States, 1962 Duke L. Journal 319, 322, 325 (1962) 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., WARDEN
NEBRASKA PENAL AND CORRECTIONAL COMPLEX,

Petitioner,

VS.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF THE AMICUS CURIAE

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services for the poor. Its members include the great majority of

defender offices, coordinated assigned counsel systems, and legal aid societies in the United States. In addition, 4,000 individual members, most of whom are private practitioners, are numbered among the ranks.

NLADA's concern with equal justice for the poor has caused it to be in the forefront of those whose concern is the preservation of our civil liberties and the fundamental freedoms guaranteed by the Bill of Rights. The exclusionary rule is an essential ingredient of those rights guaranteed by the Constitution. Any attempt to weaken it or modify it would shake the foundations of the criminal law as now constituted and further complicate judicial administration. Confessions, eye-witness identifications, the right of privacy, as well as the right of citizens to be secure in their homes would all be threatened by the abolition or modification of this important tool. Poor people would be victimized without recourse and without effective deterrent. Therefore, NLADA supports the position of the Eighth Circuit Court of Appeals in filing this Amicus Brief. NLADA has received the consent of both parties for the filing of this brief.

SUMMARY OF ARGUMENT

The Fourth Amendment to our Constitution was created to protect the privacy of citizens from government intrusion. This court announced an exclusionary rule of evidence in an effort to give meaning to the Fourth Amendment and to preserve judicial integrity. The petitioners have criticized the exclusionary rule but have not shown any alternative which has proven to be effective. Petitioners suggested modification of the exclusionary rule would add further confusion to the law

of search and seizure and would place the protections guaranteed by the Fourth Amendment in the discretion of the police.

To permit the State to supplement a faulty affidavit for search warrant at a subsequent proceeding is contrary to the clear, express language of the Fourth Amendment. Such an after-the-fact showing of probable cause is inconsistent with the purpose of the warrant clause of the Fourth Amendment—to protect the right of privacy by placing a judicial officer between the police and the individual. This purpose can only be satisfied by a prior determination of probable cause.

The holdings, reasoning and principles of this Court, for decades, establishes that only a prior determination of probable cause can satisfy the warrant clause of the Fourth Amendment.

The Decisions of this Court provide that a person who asserts that a violation of his 4th Amendment rights led to his conviction in a state court may seek the protection of those rights in a Federal District Court pursuant to the provisions of 28 U.S.C. § 2254 and that a claim of innocence is not a condition precedent to an application for such relief.

Amicus prays that this Court will reject petitioners request for a departure from the law as it now exists.

ARGUMENT

I.

THIS COURT SHOULD SUPPORT THE RIGHT OF PRIVACY AND UPHOLD JUDICIAL INTEGRITY BY AFFIRMING THE DECISION OF THE COURT OF APPEALS.

The Fourth Amendment to the United States Constitution was fashioned to protect the privacy of the citizens from government intrusion. In an effort to give meaning to the Fourth Amendment and to preserve judicial integrity, this Court announced the exclusionary rule of evidence. This Court recognized the responsibility of vindicating constitutional interests and not sanctioning unconstitutional behavior. During the 61 years of the exclusionary rule's existence, no workable alternative has been developed which will give meaning to the words of the Fourth Amendment and preserve the integrity of our judicial system. The sanctity of a person's home is a fundamental right and freedom that should not be abridged lightly or at someone's whim.

A.

Historical Development Of The Protection

Search warrants were unknown to the early common law and any unconsented entry onto the land of another was a trespass. First use of the search warrant was confined to cases where the owner of the chattels was willing to swear—with a suit for trespass certain to follow were he mistaken—that property stolen from him was lodged on the land of another.

The use of the search warrant gradually developed to allow search not only for stolen property, but for any

property which the private citizen was not permitted to possess. This included two main types of contraband which were subject to forfeiture to the crown—goods upon which the property tax had not been paid and the means of instrumentalities of a crime. In each of these cases, the property seized might also be used as evidence, but a necessary condition of the seizure was the fact that the citizen was for some reason not entitled to possess the property. (Kaplan, Search and Seizure: A No Man's Land in Criminal Law, 49 California Law Review 474 (1961)).

The search warrant requirements of the federal and state constitutions are historically attributable to opposition in England to "general warrants" and in this country to "writs of assistance", which were used in an attempt to broaden the limited scope of search warrants under the early common law. (*Stanford v. Texas*, 379 U.S. 476 (1965)).

In seventeenth century England, general warrants were authorized by the Court of Star Chamber and the Secretary of State to suppress political criticism of the Crown. Both general search warrants and general arrest warrants were issued against the authors, printers and publishers of alleged politically libelous books and pamphlets. These warrants were in effect a carte blanche for the arrest of anyone and the search of anything. No person was named in the warrants, no place was described and no evidence of connection with the crime was required for issuance. Only the executing officer's discretion limited the application of the warrants. (1 Cooley, Constitutional Limitations 610-15 (1927)).

The abuse wrought under these warrants were put to an end by Lord Camden's famous opinion in *Entick v.*

Carrington (19 Howell's State Trials 1029 (1765)) portions of this opinion were liberally quoted in *Boyd v. United States*, 116 U.S. 616 (1886).

The abuse became so great that in 1766 the British House of Commons passed resolutions condemning general warrants for the seizure of persons or papers, but the protection of such parliamentary action did not filter down to the colonies. Instead, our colonial forebearers suffered from unlimited searches and seizures through the unrestrained use of general search warrants. These writs were issued to revenue officers to search for smuggled goods; the only limitations of the writ was the executing officer's discretion.

The illegality of the issuance of general writs of assistance, and the danger to the people resulting from their use by government, was pointed out by James Otis in his memorable address before the Superior Court in Boston in 1761. James Otis declared the writs to be "the worst instrument of arbitrary power, the most destructive of English liberty and fundamental principles of law, that ever was found in an English law book; since they placed 'the liberty of every man in the hands of every petty officer'." (1 Cooley, Constitutional Limitations, supra).

The proposed Constitution for the United States of America which came from the hands of the members of the Constitutional Convention in 1787 did not include a Bill of Rights. To allay the fears of those who held the view that a Bill of Rights was essential to any document creating a national government, the supporters agreed to propose amendments incorporating these provisions in the first session of the new Congress. Without this promise, it's unlikely that the Constitution would have been ratified.

The Fourth Amendment was adopted to protect the individual from the power of government. Being a part of the constitution protected the amendment from legislative change due to popular whim.

In 1886, this Court in *Boyd v. United States*, 116 U.S. 616, held that the Fourth Amendment created a pervasive constitutional right against governmental intrusion into the privacy of the individual. The court recognized the constitutional right of an individual to preserve the sanctity of his home and the privacies of life from intrusion by the government and its employees.

Later in 1914, this Court in *Weeks v. United States*, 232 U.S. 383 established a Federal Exclusionary Rule regarding evidence seized in violation of the Fourth Amendment. In that case, federal marshals conducted warrantless searches of the defendant's house and obtained various papers which they later used, over his objection, as evidence at his trial. This court noted that:

> "If letters and private documents can thus be seized and held and used in evidence against a citizen accused of an offense, the protection of the Fourth Amendment, declaring his right to be secure against such searches and seizures, is of no value and so far as those thus placed are concerned, might as well be stricken from the Constitution. The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering in the fundamental law of the land." (393)

Stressing the importance of judicial integrity, Mr. Justice Day further stated:

> "To sanction such proceedings would be to affirm by judicial decision a manifest neglect if not open defiance of the protection of the people against such unauthorized action." (394)

The decision in *Weeks* applied only to federal cases.

In *Mapp v. Ohio*, 367 U.S. 643 (1961), the Exclusionary Rule which had previously been applied only in federal cases was held to be an essential part of due process and was thus applied to the States. Moreover, Mr. Justice Clark, speaking for the majority in *Mapp*, emphasized the importance of judicial integrity, stating:

> "Our decision, founded on reason and truth, gives to the individual no more than the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled and to the courts, that judicial integrity so necessary in the true administration of justice." (660)

B.

The Importance Of Preserving Judicial Integrity

One of the primary reasons this Court established the Exclusionary Rule was to preserve judicial integrity. In an era in which disrespect for legal process is increasingly manifested, it is important that judicial institutions reaffirm their commitment to judicial integrity. If the courts themselves will not affirm the integrity of the judicial process in an area which they exercise control, they cannot expect the public at large to have respect for law. In order to promote confidence in the administration of justice, this Court has decided government officials must obey the law in the same manner that other citizens are required to do so. The Fourth Amendment was intended to protect citizens from the government and places specific restrictions on the judiciaries power to issue search warrants. The Amendment is a limitation on the entire criminal justice system and imposes restraint upon courts, police and prosecutors alike.

Commenting upon the concept of judicial integrity in *Terry v. Ohio*, (392 U.S. 1 (1967) at 13), the Court stated:

> "Courts which sit under our Constitution cannot and will not be made party to lawless invasions of the constitutional rights of citizens by permitting unhindered governmental use of the fruits of such invasions. Thus in our system evidentiary rulings provide the context in which the judicial process of inclusion and exclusion approves some conduct as comporting with constitutional guarantees and disapproves other actions by state agents. A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur."

It is not only the integrity of the courts to which this problem is addressed, but also the integrity of the Constitution which protects each individual in our society and is the fabric which holds our society together.

The instant case presents an excellent example of this court's duty to preserve judicial integrity. This case involves the issuance of an illegal search warrant by a member of the judiciary. The petitioners focus their attention on the actions of the police officers and by so doing ignore the need to review the actions of the judge. The Fourth Amendment was incorporated into the constitution to protect individual citizens from all members of the government. For the court to act as if it is detached from the prosecution of an alleged criminal violator, it must ignore the manner in which citizens view it. A citizen wants protection from the violations of constitutional rights by members of the executive, judicial and legislative branches of government.

In the instant case, a magistrate commanded certain police officers to go into Respondent's home to look for evidence (Petitioners' Appendix p. 9, 10). The action by the judge was clearly illegal (*Wolff v. Rice*, 513 F. 2d 1280). The same judge who issued the illegal warrant decided that probable cause existed for the continued prosecution. At the trial of the instant case, a brother judge admitted the illegally seized evidence and subsequently sentenced the defendant to life imprisonment.

> "The trial is part of the whole prosecution just as the court is a part of the whole government that is investigating, charging, judging and sentencing the individual." Schrock and Welsh, Up From Calandra: The Exclusionary Rule as a Constitutional Requirement, 59 Minnesota Law Review 251 (258) (1974).

The trial is part of the whole prosecution of an individual citizen by the government. The courts cannot disavow responsibility for the manner in which evidence is obtained when they affirmatively sanction the illegal behavior by admitting the evidence or in this case where the courts command that the evidence be seized. *Amicus* requests that this court reject the request of the petitioners and refuse to affirmatively sanction the unconstitutional behavior present in the case at bar.

C.

Attacks On The Exclusionary Rule

The petitioners attack the exclusionary rule by addressing themselves to the rule's deterrence function and ignoring the need to preserve judicial integrity. In response to these arguments, *amicus* must disagree with certain basic assumptions inherent in petitioner's philosophy. Amicus contends:

1) Crime is not caused by the Bill of Rights.
2) Crowded court calendars are not the product of the 4th Amendment.
3) All citizens who are charged with a crime and benefit from the exclusionary rule are not guilty of the crime charged.
4) Police are not punished by the court's refusal to sanction illegal seizures of evidence.

Throughout the discussion of the problem, the tendency for those who are critical of the rule is to speak in terms of the "honest" citizens as opposed to the "criminals" or the "guilty". As one commentator has noted,

> "It is seriously misleading, however, to suggest that wholesale release of the guilty is a consequence of the exclusionary rule. It is a large assumption that the police have invariably exhausted the possibilities of obtaining evidence legally when they have relied upon illegally obtained evidence. It is more rational to assume the opposite when the offer of illegally obtained evidence becomes routine." Traynor, *Mapp v. Ohio at Large in the Fifty States*, 1962 Duke L. Journal, 319, 322 (1962).

This kind of dichotomy between the "honest" citizen and the "criminal" can only lead to emotional responses rather than rational ones. It should not be forgotten that it is the person with unpopular views, for example, who tests the constitutional right to free speech; it is the person who is prosecuted for the violation of some offense who tests the validity of the words that proclaim procedural due process in our society. As long as the discussion emphasizes that "honest, upright citizens" are on the one side and the law violator on the other, the only conclusion that can be arrived at is that these rights that protect the outcasts and unpopular within our society should be eliminated.

> "The understandably impatient lawabiders, who approve official retribution without restraint against wrongdoers, do not visualize themselves as the objects of oppressive government action in any near future. Not for them are the warnings of history." Traynor, *Mapp v. Ohio At Large in the Fifty States*, 1962 Duke L. Journal 319 at 325 (1962).

It is only a short step to the abolition of all our rights under the Bill of Rights if constitutional problems are placed in this framework since the only persons who directly test the protections are the pariahs of our society. Such a danger was recognized by this Court in *Boyd v. U.S.*, 116 U.S. 616, 635 (1886).

> "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedures." Id. at 635.

It should be remembered that this court did not move hastily in imposing the exclusionary rule on the States. It waited 12 years after its decision in *Wolf v. Colorado*, 338 U.S. 25 (1949). This Court in *Wolf* wanted the States to act as "laboratories" to experiment with alternative remedies to the exclusionary rule. During these years when this court held back, such alternative "remedies" to the exclusionary rule as internal police discipline procedures, prosecution of police and private tort actions proved utterly worthless. Actually, those States that wished to have an effective remedy against illegal search and seizure practices by the police chose the exclusionary rule. By 1956, 23 States had abandoned other methods of enforcing search and seizure protections in favor of the exclusionary rule in the hope of shaping police conduct to conform to constitutional standards. (See Annot. 50 A.L.R. 2d 531, 556 et seq. (1956)).

This court found in *Mapp v. Ohio*, 367 U.S. 643 (1961) that in those states which did not provide such a remedy, constitutional search and seizure protections were nothing more than an empty promise. Now, a little over 14 years after *Mapp*, it is claimed that the exclusionary rule has not worked. There is no empirical data to establish this. Such proof is not found in Professor Oak's article, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. of Ch. L.R. 665 (1970). Indeed, although Professor Oaks questions the value of the exclusionary rule, he concedes that there is no statistical data available challenging its effectiveness. Actually, there is no way to be certain what precise effect the exclusionary rule has had on police conduct without an extensive examination of at least a representative sample of police actions in connection with particular searches, seizures and arrests. This is so because no notoriety attends *legal* police conduct, and both incidents and the motivation for it go unrecorded. It is probable that very marked, but unmeasured, improvements in police procedures have taken place. For example, there has not come to the attention of the courts since the *Mapp* decision, any cases revealing such outlandish police practices as took place in California in the *Irvine* and *Cahan* cases. Indeed, if it is assumed that police intend to be both rational and lawful, then the exclusionary rule must have contributed to more lawful actions by the police, augmented the professionalism of law enforcement officers, and improved the integrity of the judicial process by leeching from it at least some illegally acquired evidence. Furthermore, the overwhelming percentage of pleas and convictions which attend charges provides ample proof that the rule has not stultified either police work or the judicial process. At the same time, there is no demonstrated connection

between increases in crime rates and the rule. To conclude otherwise requires generalizations about cause and effect in crime rates which are unwarranted without vastly more data and analysis than is now available.

The petitioners suggest that this court modify the application of the exclusionary rule before any effective alternatives have been shown to exist or that the need for the protection has diminished. Moreover, they fail to show that any state has demonstrated an effective alternative to the exclusionary rule.

With such inconclusive and inconsistent data at hand, certainly judicial conservatism would dictate that the Exclusionary Rule should not be eliminated or narrowed without more substantial corroboration.

The suggestion that this court create a new interpretation of the exclusionary rule which would except good faith violations from its purview would create a whole new body of law, involve the courts in inquiring into the motivations of individual police officers, create new incentives for police officers to lie and further confuse the law of search and seizure.

In *Beck v. Ohio*, 379 U.S. 89, (1964), Mr. Justice Stewart addressed himself to the "good faith" of the police officers. He stated,

> "We may assume that the officers acted in good faith in arresting the petitioner. But 'good faith' on the part of the arresting officers is not enough." *Henry v. United States*, 361 U.S. 98, 102. "If subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers and effects', only in the discretion of the police." (97)

The practical effect of such a change would protect search warrants from review by the courts since defense lawyers would not litigate the illegality of the search warrant if their success would provide no relief for their client. This would not enhance further professionalization of the judicial profession and would frustrate this court's attempt to protect the constitutional rights of citizens.

Although the petitioners have criticized the exclusionary rule, they have failed to illustrate a successful alternative. *Amicus* requests that this court uphold the right to privacy guaranteed in the Fourth Amendment and judicial integrity by refusing to sanction the unconstitutional behavior in the instant case.

II.

ALLOWING ADDITIONAL FACTS TO BE PRESENTED AT A SUPPRESSION HEARING TO VALIDATE THE ORIGINAL AFFIDAVIT FOR A SEARCH WARRANT IS CONTRARY TO THE EXPRESS LANGUAGE OF THE FOURTH AMENDMENT AND CONTRARY TO THE PURPOSE FOR THE WARRANT REQUIREMENT.

The petitioners' argument that additional facts should be permitted at a subsequent proceeding to validate a prior affidavit for search warrant is specifically contrary to the express prohibition in the Fourth Amendment that "no warrant shall issue, but upon probable cause . . ."

Whatever may be shown at a subsequent proceeding, the unrebuttable fact remains that a search warrant was *issued* without probable cause. Consequently, for petitioners' argument to succeed, it is necessary to ignore the specific express prohibition of the Fourth

Amendment and conclude that even though a search warrant was issued without a showing of probable cause, the search can be upheld due to the existence of probable cause which was not presented to obtain the warrant. Such an argument finds no support in the opinions of this Court, but rather has been consistently rejected.

In *Silverthorne Lumber Co. v. United States*, 251 U.S. 385, (1920), Mr. Justice Holmes pointed out that the fact that the results of the search and seizure might have been achieved in a constitutional manner, rather than the unconstitutional manner actually used, is, in effect, irrelevant. (251 U.S. at 392; see also, *Mancusi v. DeForte*, 392 U.S. 364 (1968)). Mr. Justice Holmes also noted that to permit the government to use the knowledge gained "by doing the forbidden act" would reduce "the 4th Amendment to a form of words". (251 U.S. at 392) Surely the Fourth Amendment is not merely a "form of words" without substance. In fact, Mr. Justice Powell has recently observed that "the warrant clause of the Fourth Amendment is not dead language . . . Rather, it has been 'a valued part of our constitutional law for decades'." *United States v. United States District Court*, 407 U.S. 297, 315 (1972).

To uphold a search made pursuant to warrant issued without probable cause is to render the warrant clause of the Fourth Amendment, that "*no* warrants shall *issue*, but upon probable cause," "dead language" or a mere "form of words".

The need for a determination that probable cause exists for a search prior to the issuance of a search warrant can be seen from the history and purpose of the warrant requirement. The Fourth Amendment developed from the reaction to the "general warrants

and warrantless searches that had so alienated the colonists", *Chimel v. California*, 395 U.S. 752, 761 (1969), and sought to protect each individual from the "invasion of his indefeasible right of personal security, personal liberty and private property." (*Boyd v. United States*, 116 U.S. 616, 630 (1886). In order to prevent arbitrary invasions upon the right of privacy, "which is at the core of the Fourth Amendment", *Wolf v. Colorado*, 338 U.S. 25, 27 (1949), the Fourth Amendment places a judicial officer between the police and the individual.

> "When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement officer." *Johnson v. United States*, 333 U.S. 10, 14 (1948). See also, *McDonald v. United States*, 335 U.S. 451, 453 (1948); *Coolidge v. New Hampshire*, 403 U.S. 443, 449-50 (1971).

Consequently, to enforce or give meaning to the purpose of the Fourth Amendment it is necessary for a neutral judicial officer to find probable cause *prior* to the authorization for search; a finding of probable cause subsequent to the authorization for search totally fails to allow the judicial officer to play the vital role required by the Fourth Amendment. Thus, this Court has consistently held that a search without a *valid* search warrant, issued by a judicial officer *after* being supplied "with sufficient information to support an independent judgment that probable cause exists for the warrant" (*Whiteley v. Warden*, 401 U.S. 560, 564 (1971), and cases cited therein), is *per se* unreasonable, *Katz v. United States*, 389 U.S. 347, 357 n. 18 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 528-29 (1967); *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973)), except in a few specific, limited and exigent situations (*Katz v. United States*, 389 U.S. 347, 357 n. 19 (1967); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

The requirement of a search warrant has been applied to fulfill the purpose of the Fourth Amendment regardless of whether or not probable cause may have existed beyond the legal process. In *Agnello v. United States*, 269 U.S. 20 (1925), in a unanimous opinion delivered by Mr. Justice Butler, this Court decided that:

> "Belief, however well founded, that an article sought is concealed in a dwelling house, furnishes no justification for a search of that place without a warrant. And such searches are held unlawful notwithstanding facts unquestionably showing probable cause." 269 U.S. at 33.

The foregoing principle is now well settled, having been applied by this Court for decades to the present time. *Johnson v. United States*, 333 U.S. at 14 n. 4, *Jones v. United States*, 357 U.S. 493, 497-98 (1958); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970); *Coolidge v. New Hampshire*, 403 U.S. 443, 450-51 (1971).

The argument for "after-the-event" justification for a search has been advanced to this Court previously and has been soundly rejected. In *Katz v. United States*, 389 U.S. 347 (1967), it was stated:

> "It (Government) argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization 'bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment.' *Beck v. Ohio*, 379 U.S. 89, 96" 389 U.S. at 358.

Likewise, in *United States v. United States District Court*, 407 U.S. 297 (1972) where the Government argued the validity of executive approved surveillance without prior judicial approval, this Court stated:

> "The Fourth Amendment contemplates a prior judicial judgment, not the risk that executive discretion may be reasonably exercised . . . The independent check upon executive discretion is not satisfied, as the Government argued, by 'extremely limited' post-surveillance judicial review. Indeed, post-surveillance review would never reach the surveillances which failed to result in prosecutions. Prior review by a neutral and detached magistrate is the time-tested means of effectuating Fourth Amendment rights". 407 U.S. at 317-18.

The petitioners by arguing that additional facts should be allowed to bolster or validate a prior insufficient affidavit for search warrant are, in effect, asking this Court to overrule decades of decisions, reasoning and sound principles. Additionally, petitioners seemingly ignore the purpose and history of the warrant requirement. If the judicial officer who issues the search warrant need not be given information which constitutes probable cause, his function becomes drastically less than that envisioned in the Fourth Amendment, and it is questionable if such a judicial officer can effectively comply with the "further requirement of probable cause (which) instructs the magistrate that baseless searches shall not proceed". *United States v. United States District Court*, 407 U.S. at 316.

III.

THIS COURT SHOULD NOT INHIBIT THE ENFORCEMENT OF FOURTH AMENDMENT RIGHTS BY LIMITING THE RELIEF PRESENTLY AVAILABLE UNDER 28 U.S.C. § 2254

This Court has recently held, in *Lefkowitz v. Newsome*, 420 U.S. 283, (1975), that a defendant pleading guilty in a state court was not foreclosed from pursuing a claim of the violation of his Fourth Amendment rights in a federal habeas corpus proceedings, if state law permitted a review of such constitutional issues after a plea.

That decision notwithstanding this petitioner continues to argue that the doors to the Federal Court should be closed to those habeas corpus petitioners who assert the denial of fourth amendment rights but do not assert their innocence. A claim of innocence, however, has never been an essential allegation in the petition for the writ. Habeas corpus has been available, as an example, to question the sufficiency of an indictment even after petitioner's conviction.

Justice Powell, in his dissenting opinion in *Schneckloth v. Bustamonte*, 412 U.S. 218, (1973), cited by petitioner in this case said, "I am aware that history reveals no exact tie of the writ of habeas corpus to a constitutional claim relating to innocence or guilt."

The respondent in this case plead not guilty and has continuously asserted his innocence throughout the appeals in the Nebraska State Courts and in the U.S. District Court, the U.S. Court of Appeals and in this Court.

Petitioner seems further to suggest that fourth amendment rights somehow do not rise to the dignity of other rights secured by the Bill of Rights. The claim would

appear to be that since the defendant has been convicted, the violation of his right to be protected against unreasonable searches and seizures amounts to little more than a minor annoyance to the defendant which does not impugn the integrity of the fact finding process and which is not worthy of the attention of the Federal Courts.

Amicus has earlier argued that an important part of the fact finding process is the integrity of the forum in which the matter is heard. The element of judicial integrity in the fact finding process was one of the paramount reasons for fashioning of the exclusionary rule.

The historical and constitutional significance of fourth amendment rights was explained by this Court in *Boyd v. U.S.*, 116 U.S. 616, (1886), in which Justice Bradley said:

> "The principles laid down in this opinion affect the very essence of constitutional liberty and security. They reach farther than the concrete form of the case then before the court, with its adventitious circumstances; they apply to all invasions, on the part of the Government and its employees, of the sanctity of a man's home and the privacies of life. It is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offense; it is the invasion of this sacred right which underlies and constitutes the essence of *Lord* Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods is within the

> condemnation of that judgment. In this regard the Fourth and Fifth Amendments run almost into each other." (630)

Petitioners apparently believe that state courts are always willing to adequately protect a defendant's federal constitutional rights and that resort to the Federal Courts is a disservice to the principles of federalism and causes friction between State and Federal Courts. Were it not for these interminable petitions, the argument runs, we would more effectively utilize federal judicial resources, achieve finality in criminal cases and reduce federal state friction, through the proper observance of the principles of federalism.

Petitioners' belief that the state courts are willing to adequately protect a defendant's federal constitutional rights would appear to have little support in light of the decisions of Federal Courts protecting the Constitutional rights of persons whose claims were denied in State Courts.

Two of the numerous cases of this type involve habeas corpus petitioners who had been denied the assistance of counsel in misdemeanor prosecutions in the Florida State Courts long after the U.S. Court of Appeals for the Fifth Circuit had required such assistance.

In *Steadman v. Duff*, 302 F. Supp. 313 (M.D. Fla. 1969), the District Court granted defendant relief and referring to certain arguments made in this case by petitioner, said,

> "Comity must operate both ways, and the Florida courts have consistently refused to recognize the repeated federal mandates of the Fifth Circuit. Here the traditional presumption that state courts will protect constitutional rights in good faith has been overcome. Indeed, this Court vacated eight

misdemeanor convictions rendered by the Justice of the Peace Courts of Volusia County for failure to offer indigent misdemeanants court-appointed counsel nearly two years ago in Cloer v. Thursby, No. 67-618-Civ-J (M.D. Fla., filed Nov. 29, 1967).

The time-honored principle of federalism cannot be made a shield to protect state courts reluctant to accept federal decisions. Inherent in the original concept of federalism was not only the idea of pluralism of state and federal governments, but also the principle that the federal courts would operate as a check on the states to preserve constitutionally guaranteed rights. *See* Note, Theories of Federalism and Civil Rights, 75 Yale L.J. 1007, 1015, 1029-32 (1966).

It is settled that if resort to state remedies would be futile because state courts have conclusively ruled against petitioner's position, a federal court may hear and decide a petition for habeas corpus without requiring exhaustion of state remedies." (316)

In *Bramlett v. Peterson*, 307 F. Supp. 1311 (M.D. Fla. 1969), the Court granted injunctive and Habeas Corpus relief and said,

> The abstention doctrine is not applicable here, for its purpose is to permit state courts to have a first opportunity to resolve new issues of constitutional law or questions in which federal and state law are intertwined. *See* Comment, 68 Colum.L.Rev. 1201, 1205-06 (1968). As set out above, however, the issue of counsel for accused indigent misdemeanants is neither new nor complex.
>
> If the purpose of the abstention doctrine is simply to permit state courts an opportunity to hear a given question that otherwise would be preempted to federal courts, that purpose is met by the Boyer v. City of Orlando case, *supra*, argued before the Florida Supreme Court on November 12, 1969.

> Moreover, Florida courts have consistently heretofore refused to recognize Fifth Circuit Court of Appeals mandates. Steadman v. Duff, 302 F. Supp. 313, 315 (M.D. Fla., 1969). Although we will not assume that the Florida Supreme Court will ignore further the many precedents that have accumulated, neither will we wait for the *Boyer* result." (1321)

Since the Federal Courts are the final arbiter of federal constitutional questions and since state courts do not always adequately protect a defendant's constitutional rights the problems which petitioner raises with regard to federal-state friction seem likely to continue.

If there is a strain put upon the limited federal judicial resources caused by the filing of habeas corpus petitions raising fourth amendment issues, as petitioner claims but does not demonstrate, it would appear that the answer might be to seek to increase the amounts of money allocated to the federal judiciary or to institute administrative procedures which would relieve the strain. The answer is not to bar the door of the Federal Court to petitioners seeking the vindication of their federal constitutional rights.

These rights secured by the fourth amendment are of the very essence of constitutional liberty and neither the habeas corpus act nor the decisions of this Court require that the protection of the federal courts be limited to those who claim innocence.

Amicus respectfully prays that this Court will reject petitioners' request for such a radical departure from the letter and spirit of the law as it now exists.

CONCLUSION

For the foregoing reasons, *Amicus* respectfully requests that this Court affirm the judgment of the Eighth Circuit Court of Appeals below.

Respectfully submitted,

THEODORE A. GOTTFRIED
BRUCE STRATTON
ROBERT E. DAVISON
Office of the State Appellate Defender
300 East Monroe Street, Suite 100
Springfield, Illinois 62701

NATIONAL LEGAL AID AND
DEFENDER ASSOCIATION
2100 M Street, N.W.
Washington, D. C.
1155 East 60th Street
Chicago, Illinois

Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden of the Nebraska Penal and Correctional Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL LAWYERS' GUILD AND CENTER FOR CONSTITUTIONAL RIGHTS *AMICI CURIAE*

JONATHAN M. HYMAN,
Constitutional Litigation Clinic
Rutgers University School of Law,
175 University Avenue,
Newark, New Jersey. 07102
(201) 648-5687

Attorney for Amici Curiae.

Adams Press Corp., 11 Commerce Street, Newark, N. J. 07102—(201) 623-8611

TABLE OF CONTENTS

		Page
INTEREST OF THE AMICI CURIAE . . .		1
SUMMARY OF ARGUMENT		4
ARGUMENT		9
I.	IT WOULD BE JUDICIALLY UNSOUND TO ATTEMPT MODIFICATIONS OF THE EXCLUSIONARY RULE THROUGH RESTRICTIONS ON HABEAS CORPUS JURISDICTION	9
II.	HABEAS CORPUS RELIEF HAS BEEN AVAILABLE FOR ALL CONSTITUTIONAL VIOLATIONS AT LEAST SINCE BROWN v. ALLEN AND PROBABLY SINCE MOORE v. DEMPSEY. NOTHING HAS HAPPENED SINCE THE CURRENT HABEAS CORPUS DOCTRINE WAS ANNOUNCED TO JUSTIFY ABANDONING THAT RULE	14
III.	RESTRICTION OF HABEAS CORPUS REVIEW BY EXCLUDING FOURTH AMENDMENT CLAIMS WOULD NOT REMEDY THE PROBLEMS IT PURPORTS TO SOLVE	26
IV.	THE AVAILABILITY OF FOURTH AMENDMENT CLAIMS AS THE BASIS FOR FEDERAL HABEAS CORPUS RELIEF SERVES SUBSTANTIAL INTERESTS WITHIN THE PURPOSE AND MEANING OF THE WRIT	34
	A. Fourth Amendment Claims Serve Interests of Justice through the Promotion of Judicial Integrity, and are, therefore, Properly Cognizable Grounds for Federal Habeas Corpus Relief	34

Table of Contents
(Continued)

Page

B. Habeas Corpus Review of Fourth Amendment Claims Has a Deterrent and Educational Effect Which Must be Preserved, Particularly With Respect to the Magistrates Who Issue Warrants 38

C. Fourth Amendment Claims Should be Available in Habeas Corpus Because Federal Review Promotes Uniformity in Federal Standards 43

CONCLUSION 46

TABLE OF CASES
AND
AUTHORITIES

Cases

Adams v. Williams, 407 U.S. 143 (1972) 16

Bivens v. Six Unknown Agents, 403 U.S. 388 (1971) 9

Boyd v. United States, 116 U.S. 616 (1886) 29

Brown v. Allen, 344 U.S. 443 (1953) . 14,15,16,18,19,22,23

Table of Cases
(Continued)

Page

Elkins v. United States, 364 U.S. 206 (1960) 35

Fay v. Noia, 372 U.S. 391 (1963). 15,19

Frank v. Mangum, 237 U.S. 309 (1915) 15

Kaufman v. United States, 394 U.S. 217 (1969) 14,19,27,39

Ker v. State of California, 374 U.S. 23 (1963) 42

Lefkowitz v. Newsome, 420 U.S. 283 (1975) 16

Mancusi v. Forte, 392 U.S. 364 (1968) 28

Mapp v. Ohio, 367 U.S. 643 (1961) 19,24

McNabb v. United States, 318 U.S. 332 (1943) 35

Miranda v. Arizona, 384 U.S. 436 (1966) 19

Mitchell v. W.T. Grant, 416 U.S. 600 (1974) 17

Moore v. Dempsey, 261 U.S. 816 (1922) 15,16

Rochin v. California, 342 U.S. 165 (1952) 29

Table of Cases
(Continued)

Page

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) . 14,18,21,27,36

Silverthorne Lumber Co. v. United States, 251 U.S. 385 (1920) 34

Warden v. Hayden, 387 U.S. 298 (1967) 16

Weeks v. United States, 232 U.S. 383 (1914) 34,36

Whitely v. Warden, 401 U.S. 560 (1971) 16,28

Legislation

S. 3833, 92d Congress 24

S. 567, 93d Congress 24

Other Authorities

Administrative Office of the Courts, Annual Report, 1972, 1973 and 1974 20

American Law Institute, Model Code of Pre-Arraignment Procedure, Draft No. 1 (1974) 12,32

Amsterdam, Search, Seizure and Section 2255, 112 U.Pa.L. Rev. 378 (1964) 10

Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441 (1963) 15

Page

Other Authorities (Continued)

Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970) 15

Federal Judicial Center, Report of the Study Group on the Caseload of the Supreme Court, (1972) 44

Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 U.Chi.L.Rev. 142(1970) 29

Hart, Forward: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84 (1959) 15

Note, Federal Habeas Corpus for State Prisoners and the Fourth Amendment, 52 N.C.L. Rev. 633 (1974) 31

Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U.Chi.L.Rev. 665 (1970) . 36

Reitz, Federal Habeas Corpus, Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315 (1961) 15

Schaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1 (1956) 21,27

D. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv.L.Rev. 321 (1973) . . . 20

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional
Complex,

Petitioner,

vs.

DAVID L. RICE,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE NATIONAL LAWYERS' GUILD and the CENTER FOR CONSTITUTIONAL RIGHTS

AMICI CURIAE

INTEREST OF THE AMICI CURIAE

The National Lawyers' Guild is an association of lawyers, law students and legal workers which seeks to defend the

rights and liberties secured under the Constitution. Many of its members are trial lawyers or persons otherwise engaged in civil and criminal litigation directed at the preservation of civil liberties. Its members are involved deeply also in the area of prisoners' rights.

The Center for Constitutional Rights is a not-for-profit corporation interested in preserving constitutional rights and civil liberties through education and litigation. It has represented many clients on civil liberties matters, including litigation in this Court.

One issue in this case is whether the federal habeas corpus statute, 28 U.S.C. § 2254, authorizes federal habeas corpus review of Fourth Amendment claims. The Amici have an on-going interest in this issue since the Court's decision could have a significant impact on the avail-

ability of a federal forum for the review of federal constitutional rights. The Amici are also concerned that the Bill of Rights remains a vigorous and effective tool for protecting the civil liberties of the American people. The Amici have received the consent of the parties for filing this brief.

SUMMARY OF ARGUMENT

This brief addresses the question put by the Court when it granted certiorari in this case: whether the habeas corpus statute, 28 U.S.C. § 2254, authorizes federal court review of Fourth Amendment claims, such as are presented here. It is a procedural question, and is distinct from the more substantive questions surrounding the Fourth Amendment and the exclusionary rule. The Court should bear the distinction in mind and consider the habeas corpus issue on its own merits, in terms of the principles and policies that argue for and against the scope of such review, not in terms of the exclusionary rule. Commingling habeas corpus and exclusionary rule doctrines would lead to murkiness and instability in both, would be ineffective in resolving any failures the

Court might perceive in the exclusionary rule and would ignore a number of carefully thought-out suggestions that have been made for modifying the exclusionary rule. Habeas corpus jurisdiction should not be used to modify the exclusionary rule.

Restricting the scope of habeas corpus review is unjustified. The Court should not overturn the long established scope of habeas corpus review unless the underlying balance of facts and principles has significantly changed since the doctrine was established. No such change has occurred here. The arguments now advanced in favor of restricting habeas corpus review were vigorously propounded in 1953, when the current rule was firmly enunciated. They have gained no additional weight during the intervening 20 years. The burden im-

posed on federal courts by Fourth Amendment habeas corpus claims remains relatively small. Very few habeas corpus petitions actually come to trial, and a miniscule number of state criminal convictions are overturned. Punishment is not delayed, since the prisoner remains in jail while he brings his petition (and most likely will remain there afterwards). Federal courts continue to hear only federal, not state, questions.

More importantly, no review standard the Court substituted for the present one would solve any of the perceived habeas corpus problems. A jurisdictional rule limited to guilt or innocence or the reliability of evidence would lead to intolerable results, denying federal review of searches conducted with stomach pumps or the bad faith seizure of personal diaries. In addition, it

would not even make a sizable dent in the number of habeas corpus petitions that would or could be brought. Other substitute rules would abandon the simplicity of the present one in favor of some balancing test, but in doing so they would only draw the federal judge into a more detailed and time-consuming examination of the state proceedings and raise the spectre of the federal judge scrutinizing the motives of the police and state judicial officers, rather than simply the correctness of their judgment.

In fact, habeas corpus review of Fourth Amendment claims continues to serve important national interests which should not be discarded. The exclusionary rule rests in part on a concept of justice and thus is properly cognizable in habeas corpus. The possibility of federal review will have some cautionary

effect on the police, so deterrence will be served. The educational effect of federal review is crucially important in a case like this, where the magistrate who issued the warrant must be taught not to accept again such a weak affidavit in support of a search warrant. Since this Court cannot hear all the Fourth Amendment claims which are urged upon it on direct review, providing an alternative federal forum, less numerous and diverse than the state courts, will encourage the development of more uniform national applications of what is, after all, a national Constitution.

ARGUMENT

I. IT WOULD BE JUDICIALLY UNSOUND TO ATTEMPT MODIFICATIONS OF THE EXCLUSIONARY RULE THROUGH RESTRICTIONS ON HABEAS CORPUS JURISDICTION

Barring habeas corpus review in this case would necessarily involve a modification of the exclusionary rule.

> [W]hen we automatically close the courthouse door solely on this basis [judicial caseload and efficiency], we implicitly express a value judgment on the comparative importance of classes of legally protected interests.
>
> Bivens v. Six Unknown Agents, 403 U.S. 388 at 411 (Mr. Justice Harlan, concurring)

But habeas corpus jurisdiction is a poor device for working changes on the exclusionary rule. Quite a few criticisms of the exclusionary rule have been voiced, and the Court is familiar with them. Limiting habeas corpus jurisdiction, however, would respond to none of

of them. Even if the exclusionary rule were eliminated from habeas corpus cases, its major impact would continue as it has at the trial and appellate levels of the judicial process.

Such a jurisdictional change would also introduce obscurity and instability into the exclusionary rule doctrine. There is not much justification for drawing exclusionary rule lines between habeas corpus petitions and other forms of delayed judicial consideration, such as appellate decisions, direct review by this Court or even a trial delayed by a crowded court docket. We know of no evidence that the deterrent effect of one is significantly different from the others. Even Professor Amsterdam has admitted that drawing the line at habeas corpus is rather arbitrary. Amsterdam, Search, Seizure and Section 2255, 112 U.Pa.L.Rev. 378, 391 (1964).

Since it is logically weak, we would not expect a distinction between habeas corpus proceedings and other proceedings to wear well, at least insofar as the exclusionary rule is concerned. Furthermore, the distinction would collapse in unpredictable ways, producing much confusion and perhaps a sense of injustice as litigants and observers tried to guess where the next changes would occur. There will continue to be much litigation involving Fourth Amendment questions, and a heavily litigated area needs clear, consistent and reasonably stable rules, not ones that are due to change.

It would be particularly inappropriate to adopt an unclear, unstable and ineffective standard in an area such as the exclusionary rule where this Court already has at its disposal a number of proposed standards that have been care-

fully thought out and address much more directly the faults perceived in the exclusionary rule. E.g., ALI, Model Code of Pre-Arraignment Procedure, Draft #1, July 15, 1972, p. 94. We do not believe that any modifications of the exclusionary rule should be undertaken, especially in the absence of effective alternative devices to protect against violations of the Fourth Amendment. But if the Court decides to change the rule, it should do so in a more coherent fashion than by modifying habeas corpus jurisdiction.

The cost of excising some parts of the Constitution from habeas corpus jurisdiction would be substantial. State prisoners would be deprived of a federal forum for their federal constitutional claims and left to the mercies of state judicial systems that from time to time do

need correction by the federal court. That cost is not justified by the limited and uncertain changes that will be wrought in the exclusionary rule by barring habeas corpus relief in this case. Instead, modifying habeas corpus jurisdiction should be justified, if at all, on the basis of concerns that are more directly tied to the operation of habeas corpus itself. We will examine such concerns in the succeeding sections and suggest that no such justification can be made.

II. HABEAS CORPUS RELIEF HAS BEEN AVAILABLE FOR ALL CONSTITUTIONAL VIOLATIONS AT LEAST SINCE BROWN v. ALLEN AND PROBABLY SINCE MOORE v. DEMPSEY. NOTHING HAS HAPPENED SINCE THE CURRENT HABEAS CORPUS DOCTRINE WAS ANNOUNCED TO JUSTIFY ABANDONING THAT RULE

It is agreed that since Brown v. Allen, 344 U.S. 443 (1953), all constitutional contentions raised in state court can be relitigated on federal habeas corpus. Kaufman v. United States, 394 U.S. 217 (1969); Schneckloth v. Bustamonte, 412 U.S. 218, 256 (1973)(Powell, J., concurring). In Brown v. Allen, Mr. Justice Frankfurter, speaking for five Justices, stated that "No binding weight is to be attached to the State determination.... The State court cannot have the last say when it, though on fair consideration and what procedurally may be deemed fairness, may have misconceived a federal constitutional right." 344 U.S. at 508. Indeed,

although the issue is the subject of much scholarly debate,*/ it is probable that habeas relief for all constitutional claims has been available since Moore v. Dempsey, 216 U.S. 86 (1923). The majority opinion in Brown v. Allen and in Fay v. Noia, 372 U.S. 391, 421 (1963), declared that it has been settled since Moore, that a federal judge has the power to disregard a state courts determination

---

*/ For the proposition that Moore v. Dempsey, 261 U.S. 86 (1923) overruled Frank v. Mangum, 237 U.S. 309 (1915) see, Hart, Foreward: The Time Chart of the Justices, The Supreme Court, 1958 Term, 73 Harv. L. Rev. 84, 105 (1959); Reitz, Federal Habeas Corpus, Impact of an Abortive State Proceeding, 74 Harv. L. Rev. 1315, 1329 (1961). See also Developments in the Law-Federal Habeas Corpus, 83 Harv. L. Rev. 1038, 1052 (1970). Contra, D. Bator, Finality in Criminal Law and Federal Habeas Corpus for State Prisoners, 76 Harv. L. Rev. 441, 488-491 (1963).

of the merits of a petitioner's constitutional claim, even where the state process is considered adequate. In addition, this Court has consistently considered, on habeas corpus, the claims of state prisoners alleging Fourth Amendment violations. Lefkowitz v. Newsome, 420 U.S. 283, at 288-293 (1975); Whitely v. Warden, 401 U.S. 560 (1971); Adams v. Williams, 407 U.S. 143 (1972); Warden v. Hayden, 387 U.S. 298 (1967).

These cases make obvious the drastic change which the proposed suggestion would work upon the Great Writ. Although the actual scope of habeas corpus review has varied with shifting concepts of due process, it has shifted uniformly for all recognized constitutional rights. Never since Brown v. Allen, and probably Moore v. Dempsey, has the Court suggested that habeas relief should not be available for

particular types of constitutional claims.

If the Court now seeks to alter the balance of values underlying broad habeas corpus jurisdiction, it should do so only if the values have been significantly disturbed by events during the intervening years. "A substantial departure from precedent can only be justified ... in the light of experience with the application of the rule to be abandoned or in the light of an altered historic environment." Mitchell v. W.T. Grant, 416 U.S. 600, 634-635 (1974)(Stewart, J., dissenting). Advocates of the proposed limitation on the scope of habeas corpus relief contend that four societal values are diminished by the availability of federal collateral review. They are: (i) the effective utilization of limited judicial resources, (ii) the necessity of finality

in criminal trials, (iii) the minimization of friction between our federal and state systems of justice and (iv) the maintenance of the constitutional balance upon which federalism is founded. Schneckloth v. Bustamonte, supra, at 259. But these values were equally present and equally important in 1953, and were fully considered in Brown v. Allen. Brown resolved the tension between these values and the constitutional rights of criminal defendants. Examination of each of the values reveals that the balance between them and constitutional rights has not changed since Brown v. Allen, and that consequently there is no justification for the proposed change in habeas corpus doctrine.

Proponents of limiting federal habeas assert that prisoners' petitions absorb too much of judges' limited time.

However, time was also limited in 1953 when the Court decided Brown v. Allen, and time was limited when the Court decided Mapp v. Ohio, 367 U.S. 643 (1961), Fay v. Noia in 1963, Miranda v. Arizona, 384 U.S. 436 (1966) and Kaufman v. United States in 1969, all of which cases predictably increased federal habeas petitions. In each case, the Court presumably weighed but ultimately rejected judicial economy as a basis for decision. Today, despite an increase in the number of petitions, the time spent by judges on habeas cases is not inordinately greater than in the last decade. Annual Reports of the Director of the Administrative Office of the Courts, 1972, '73, and '74 show several factors mitigating the impact of habeas petitions on judicial calendars: 97 to 98 per cent of petitions are disposed of before trial, with a median dispostion

time of less than one month; the number of federal judges has grown from 396 in 1961 to 667 in 1974, and support in their clerks' offices has risen correspondingly from 1,298 to 2,140; much of the increase in prisoner petitions has been in civil rights actions attacking prison living conditions, unrelated to habeas law; state prisoners' federal habeas petitions have actually declined for four straight years. See Annual Report, 1974, Tables 1, 49, 50 and C-5b. The only recent field study of habeas we know of, done from 1970 to 1972 in one judicial district confirms many of these findings. D. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973). The Court should recall Illinois Supreme Court Justice Walter V. Shaefer's reply to Justice Jackson's comparison of reading habeas petitions to looking for a

needle in a hay stack. "It is not a needle we are looking for in these stacks of paper, but the rights of human beings." Shaefer, Federalism and State Criminal Procedure, 70 Harv. L. Rev. 1 (1956).

A second argument advanced in favor of limiting habeas relief in Fourth Amendment cases is the necessity for finality in our criminal justice system. It has been suggested that at some point prisoners must accept the fact of their conviction and look forward to rehabilitation. Schneckloth v. Bustamonte, supra, at 262 (Powell, J., concurring). But punishment is not delayed by the availability of habeas corpus. Mr. Rice has been in jail for some time and remains so, as do most petitioners with habeas claims. Since extremely few prisoners are released on habeas corpus (see 83 Harv. L. Rev. at 1041) their hope of reversal cannot be very great. It is

doubtful that depriving prisoners of the habeas remedy, and of all hope of release will encourage rehabilitation; it could as easily foster bitterness. Indeed, the possibility that prisoners' claims will be fairly considered on habeas is more likely to engender respect for the criminal justice system than to deny them all chance of relief. In addition, nothing has happened since Brown v. Allen to increase the necessity of finality.

As the statistics mentioned earlier indicate, there has not been any significant change in federal-state "friction" since 1953. The number of times a federal court actually reverses a state court has been and remains minimal. In response to the argument that federal judges improperly intruded on the state criminal process, Mr. Justice Frankfurter noted that, in view of the small numbers

of reversals, "there is no basis for thinking there is such intrusion unless 'men think dramatically not quantitatively,' --Holmes, Collected Legal Papers, p. 293--" Brown v. Allen, 344 U.S. 443, 501 (1953). He went on to point out that the very small number of state prisoners who are released also

> prove[s] beyond peradventure that it is a baseless fear, a bogey man, to worry lest State convictions be upset by allowing district courts to entertain applications for habeas corpus on behalf of prisoners under State sentence. Insofar as this jurisdiction enables federal district courts to entertain claims that State Supreme Courts have denied rights guaranteed by the United States Constitution, it is not a case of a lower court sitting in judgment on a higher court. It is merely one aspect of respecting the Supremacy Clause of the Constitution whereby federal law is higher than State law. It is for the Congress to designate the member in the hierarchy of the federal judiciary to express the higher law.
>
> Id. at 510

Congress has not modified that statement of federal law, as it could have.

The Senate in its 92d and 93d terms had legislation introduced to limit the scope of habeas review to cases where "... the claimed constitutional violation has as its primary purpose the protection of the reliability of ... the factfinding process ..." i.e., guilt or innocence. S. 3833, 92d Congress; S. 567, 93d Congress. Both bills failed to clear committee. Mr. Justice Frankfurter's response to the federalism argument remains wholly adequate today.

Actually, the only factor that has changed since 1953 is the coverage of the Fourth Amendment exclusionary rule, which now applies to the states. Mapp v. Ohio, 367 U.S. 643 (1961). But, as we argued in the first section, above, limiting habeas corpus jurisdiction is

not an effective or institutionally sound manner to address the quite distinct problems posed by the exclusionary rule. Substantive Constitutional matters should be resolved directly, not through their procedural correlates.

III. RESTRICTION OF HABEAS CORPUS REVIEW BY EXCLUDING FOURTH AMENDMENT CLAIMS WOULD NOT REMEDY THE PROBLEMS IT PURPORTS TO SOLVE

If the Court finds habeas corpus review unavailable in this case, it must announce a standard to distinguish between reviewable and non-reviewable claims. Analysis of possible standards, however, shows that their adoption will not resolve the problems they are designed to meet. The concerns urged in favor of limiting habeas, discussed above, would continue to exist. The federal habeas caseload would not significantly decline; prisoners would continue to properly file petitions; and the potential for conflicts with the states would not be reduced, but might well be increased. Proposals to limit habeas review would seriously cripple the Fourth Amendment exclusionary rule without addressing the concerns of the

critics of the present scope of the Great Writ.

One proposed standard for limiting habeas would allow only those claims going to innocence or to reliability of the fact-finding process. Schneckloth v. Bustamonte, 412 U.S. 218 (1973)(Powell, J., concurring); Kaufman v. United States, 394 U.S. 217 (1969)(Black, J., dissenting). Such a standard would have minimal impact on the volume of habeas cases, according to the best available statistical evidence. A study conducted of 257 petitions filed in one federal district court from 1970 to 1972, revealed only 24 Fourth Amendment claims. Shapiro, Federal Habeas Corpus: A Study in Massachusetts, 87 Harv. L. Rev. 321 (1973). In addition, no more than 42 other petitions might have involved other constitutional claims which were

not guilt-related. Professor Shapiro concludes of Justice Powell's proposal: "...[G]iven the frequency of multiple claims in a single petition, a requirement of guilt-relatedness would not necessarily permit more petitions to be dismissed on their face." Id. at 371.

This standard would preclude federal review of some appalling Fourth Amendment violations. Not every search and seizure violation in the past has been corrected on direct appeal. E.g., Whitely v. Warden, 401 U.S. 560 (1971); Mancusi v. DeForte, 392 U.S. 364 (1968). If habeas review were eliminated, the number of Fourth Amendment petitions for certiorari to this Court would increase, and a lower percentage of them would be granted, leaving a higher number of search and seizure claims without redress.

Federal courts could not provide re-

lief on habeas for abuses like the one described in Rochin v. California, 342 U.S. 165 (1952), since Mr. Rochin's claims did not involve his innocence. Moreover, the standard is not logically confined to Fourth Amendment claims. Many Fifth, Sixth, and Eighth Amendment claims also do not go to innocence or the reliability of the fact-finding process. Friendly, Is Innocence Relevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970). Thus, a court might be placed in the position of hearing a habeas claim of improperly seized personal papers used to bear witness against a defendant at trial, and yet hold itself powerless to act. Compare Boyd v. United States, 116 U.S. 616 (1886).

Another proposed standard would be to exclude Fourth Amendment claims on habeas where the search was made in good

faith. But the difficulties of judicially separating good faith from negligence or bad faith would increase, not decrease the federal fact-finding role on habeas review. Not only would police be open to claims of bad faith, but prosecutors and magistrates would be as well. If a magistrate were to sign a warrant without reading the affidavit, or make statements showing his prejudice against the target of the search, or to in effect suspend what he knew to be the dictates of the Fourth Amendment in a self-assessed "emergency," his good faith might legitimately be questioned. Whatever federal-state friction exists now over habeas review would be infinitely increased by h a ling state magistrates into federal court for good-faith hearings.

In addition, federal court judges might be placed in the undesirable position of challenging the integrity

of state judicial processes. If a prisoner is convicted in state court despite grievous Fourth Amendment violations, and the conviction is upheld by the state appellate court, federal courts could entertain habeas corpus petitions alleging a denial of due process in the state judicial system. The granting of such relief is more likely to increase federal-state friction than is now the case when federal judges simply decide that the state court erroneously determined a question of federal constitutional law. See Note, "Federal Habeas Corpus For State Prisoners and the Fourth Amendment" 52 North Carolina Law Review, 633 at 642.

A third proposed standard to limit habeas review might be called a "balancing of interests" as proposed by the American

Law Institute. But this standard would require even more judicial fact-finding than the good faith standard, above, and merely delay federal disposition of petitions. The ALI lists seven factors, including, inter alia: the importance of the interest violated; the extent of deviation by officers and their good or bad faith; the extent of invasion of privacy; and the importance of the seized evidence to the proof of the case. Model Code of Pre-Arraignment Procedure, Draft #1, July 15, 1972, p. 94. The present case illustrates the difficulty of applying the ALI standard. Good faith is debatable since the police did not announce the staleness of their tip. The importance of the seized evidence in the case depends on the perception of each juror; there was additional evidence against the respondent. The invasion of

privacy could be called small since the police disturbed no one during the search, or large, because the search was in the defendant's home, not on the street. The extent of deviation from lawful conduct might be called small since the police had a warrant, or large, since two federal courts found little merit in any of the state's arguments justifying the intrusion. All these questions would be before a federal court if an ALI-type standard were adopted for habeas review.

Finally, whatever standard might be set by the Court in this case, we think it only fair to the respondent that the case be remanded to state court for a hearing in light of the standard, and the new issues of fact it might raise.

IV. THE AVAILABILITY OF FOURTH AMENDMENT CLAIMS AS THE BASIS FOR FEDERAL HABEAS CORPUS RELIEF SERVES SUBSTANTIAL INTERESTS WITHIN THE PURPOSE AND MEANING OF THE WRIT

A. Fourth Amendment Claims Serve Interests of Justice through the Promotion of Judicial Integrity, and are, therefore, Properly Cognizable Grounds for Federal Habeas Corpus Relief

The exclusionary rule has always embodied an element of justice. In Weeks v. United States, 232 U.S. 383 (1914) the Court grounded its holding on considerations of judicial integrity and the most fundamental notions of what constitutes justice:

> The efforts of the courts and their officials to bring the guilty to punishment, praiseworthy as they are, are not to be aided by the sacrifice of those great principles established by years of endeavor and suffering which have resulted in their embodiment in the fundamental law of the land.
>
> 232 U.S. at 393

See Silverthorne Lumber Co. v. United

States, 251 U.S. 385 (1920). The rationale of preserving judicial integrity is still quite alive. In Elkins v. United States, 364 U.S. 206 (1960) Mr. Justice Stewart, after citing the deterrence theory, noted "there is another consideration - the imperative of judicial integrity." 364 U.S. at 222. Following the rule in McNabb v. United States, 318 U.S. 332 (1943), where a conviction based on evidence secured in violation of federal statute was reversed, he then concluded, "[e]ven less should the federal courts be accomplices in the willful disobedience of a Constitution they are sworn to uphold." 364 U.S. at 223.

The sense of justice is particularly inseparable from the exclusionary rule because we lack any effective alternative devices to enforce the Fourth Amendment.

As Mr. Chief Justice Day said in Weeks v. United States, supra: without the exclusionary rule, the Fourth Amendment "might as well be stricken from the Constitution." 232 U.S. at 393. Or, as Professor Oaks, in criticizing the rule, said, "if constitutional rights are to be anything more than pious pronouncements" there must be visible consequences attached to their violation. Oaks, Studying the Exclusionary Rule in Search and Seizure, 37 U. Chi. L. Rev. 665, 756 (1970). At present there are no systematic and meaningful consequences other than the exclusionary rule, and it, therefore, is the only vehicle which can preserve the kind of fundamental justice guaranteed by the Fourth Amendment. Since the central purpose of the writ is to serve justice by remedying "unjust" convictions and confinement, Schneckloth

v. Bustamonte, supra, 412 U.S. at 257-58 (Powell, J., concurring), excluding the Fourth Amendment from the scope of federal habeas corpus relief would greatly diminish the quantum of justice the writ is intended to promote.

B. Habeas Corpus Review of Fourth Amendment Claims Has a Deterrent and Educational Effect Which Must be Preserved, Particularly With Respect to the Magistrates Who Issue Warrants

Habeas corpus review of Fourth Amendment claims has a deterrent and educational effect which should not be disregarded by this Court. It does not matter that this review may come substantially after the search and seizure in question. It is the simple fact of available review that acts as a general brake on the police, not the timing of the review. Police officers might not be expected to predict how courts will decide questions of Fourth Amendment law, but they can be expected to be careful and circumspect when treading on the borders of the Fourth Amendment. Knowing that their actions will be re-

viewed, they will be less inclined to forget the existence of the Fourth Amendment in the passions of the moment. The existence of an additional review, beyond the local judicial system to which the police belong, can only serve to enhance the cautionary effect of review. See Kaufman v. United States, 394 U.S. 217 (1969).

More important to this case is the deterrent and educational effect habeas corpus review will have on the judiciary itself. The most flagrant error in this case was made by the magistrate who signed the warrant. The affidavit on which he based the warrant was woefully insufficient, and no one appears to be arguing very strongly that it was adequate. Yet he signed the warrant, giving the patina of good faith to the subsequent home invasion carried out by

the police. Whatever might be said of the police, the judge should be expected to know the law, even in some of its finer details (although the error committed in this case did not even involve a particularly close question). He should be expected to familiarize himself with judicial decisions and keep abreast of legal developments. While few police officers may be aware of the decisions of the federal courts in this case, the judge will be. As a result, the next time an affidavit for a search warrant is presented to him, he may do the correct thing.

Correcting the local judiciary is of critical importance to the sound enforcement of the Fourth Amendment. Our system has reposed immense power in the hands of the magistrate who issues warrants, and great care must be taken to

educate that level of the judiciary and assure that mistakes do not happen twice. Once the issuing magistrate makes a mistake, the damage has been done--an improper search has taken place--and subsequent courts are left to deal with the painful task of fashioning a remedy (the exclusionary rule) that is not always satisfactory. Had the magistrate acted correctly in this case, and required the police to provide more information, either sufficient information would have been forthcoming and the case might not have lasted long in the federal courts or an illegal search would have been prevented.

Education of the magistrate becomes even more significant when one considers the searches which do not produce evidence and are thus not subject to the exclusionary rule. Those, too, should be prevented, and it is up to the magis-

trate to prevent them. The magistrate in this case is going to have many more affidavits presented to him by police officers requesting warrants. He should not repeat again and again the mistake he made here. The guidance given by the federal courts in this case should help. Even if the federal decisions only mean that the magistrate refuses to accept inadequate affidavits in a few future cases, the protection of Fourth Amendment rights thus achieved will be substantial.

One additional point should be made here. The Fourth Amendment expresses general propositions that do not by themselves plainly lead to the resolution of the myriad factual situations that arise under the Amendment. Because of this, the law must be developed by the judiciary on a case-by-case basis. See Ker v. State of California, 374 U.S. 23 (1963).

This "common law" development is a proper judicial function that is enhanced by more, not less, judicial decisions. The courts unavoidably confront new fact situations with some disagreement and varying approaches, but through the process of multiple judicial scrutiny it is hoped that some consensus can be achieved and perhaps even a rule of thumb for dealing with that particular fact situation may be developed. The uncertainty of Fourth Amendment law is not an occasion for precluding federal court review. Rather, more decisions should help to better educate the warrant-issuing magistrates.

C. Fourth Amendment Claims Should be Available in Habeas Corpus Because Federal Review Promotes Uniformity in Federal Standards

Uniformity in the application of the fundamental rights secured by the Fourth Amendment should be encouraged. The unique advantage in the availability of a

federal forum is that it allows for less variety in the institutional settings for determining Fourth Amendment law than would obtain if such decisions were left solely to the States.

Ideally there should be a single federal court in which constitutional issues are decided. This might be accomplished through the establishment of a National Court of Appeals, an idea much discussed recently, e.g., Federal Judicial Center Report of the Study Group on the Caseload of the Supreme Court, December, 1972 or through review by this Court. Both, however, prove unsatisfactory. The former is only a proposal, and this Court, quite obviously, could not assume the burden of hearing all constitutional claims.

The forum afforded by the district and circuit courts is the next best answer.

Uniformity is promoted by decision in the district courts with harmonizing review in the eleven circuit courts. Significant disparities between the circuits have always been and will continue to be resolved by this Court. Disparities among the fifty states are not so commonly addressed here.

Therefore, Fourth Amendment claims should continue to be heard in federal habeas proceedings. If not, it would be for the States to decide Fourth Amendment issues, breaking the established and congressionally mandated habeas corpus review by federal courts. The only other federal forum would be in this Court in its certiorari jurisdiction, which would result in only intermittent review of fundamental claims and an increase in petitions for certiorari.

CONCLUSION

We urge this Court to affirm the decision of the Eighth Circuit Court of Appeals below and to continue to entertain habeas corpus petitions whenever any constitutional rights are infringed. In the alternative, if the Court decides to promulgate new standards for the availability of habeas corpus relief, we ask that this case be remanded to the federal district court below so that Mr. Rice's petition can be considered in light of the new criteria.

Respectfully submitted,

JONATHAN M. HYMAN
c/o Constitutional Litigation Clinic
Rutgers Law School
175 University Avenue
Newark, New Jersey 07102
201-648-5687

Dated:
Sept. 25,1975 ATTORNEY FOR AMICI CURIAE

Counsel gratefully acknowledges the invaluable assistance of Laurence Futterman, Peter Greene, Harold Jacobowitz and Wayne Young, students at the Constitutional Litigation Clinic, Rutgers Law School, in the preparation of this brief.

CERTIFICATE OF SERVICE

I certify that on this 25th day of September 1975, copies of this brief were air mailed, postage prepaid, to the Honorable Paul L. Douglas, Attorney General of Nebraska, State Capitol, Lincoln, Nebraska, attorney for petitioner, and to J. Patrick Green, Esq., Suite 707, City National Bank Building, Omaha, Nebraska, attorney for respondent. I further certify that all parties required to be served have been served.

JONATHAN M. HYMAN
Counsel for Amici Curiae

c/o Constitutional Litigation Clinic
Rutgers Law School
175 University Avenue
Newark, New Jersey 07102
201-648-5687

Supreme Court, U. S.
FILED
SEP 25 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term. 1974

No. 74-1222

CHARLES L. WOLFF, JR., Warden,
Nebraska Penal and Correctional Complex,
Petitioner,

v.

DAVID L. RICE,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS AMICUS CURIAE

MARY M. KAUFMAN
303 West 66th Street
New York, N.Y. 10023
Attorney for Amicus Curiae

VICKIE ERENSTEIN
250 West 102nd Street
New York, N.Y. 10025
of Counsel

Dick Bailey Printers • P.O. Box X, Staten Island, N.Y. 10302 • Tel.: (212) 447-5358

TABLE OF CONTENTS

Page

The Interest of the Amicus Curiae 1

Argument 2

I—The Application Of The Exclusionary Rule Is Constitutionally Required In This Case. The Rule Should Not Be Modified. Its Sanction Is Essential To Control The Arbitrary Exercise Of Police Power. 2

II—Modification Of The Exclusionary Rule In This Case Would Increase The Already Existing Abuse Of The Rights Of Minority Group People 8

III—The Modification Or Elimination Of The Exclusionary Rule Threatens Further Incursions On The Protections Of Freedom Of Expression Erected By The Fourth Amendment. 13

Conclusion 15

CASES CITED

Beck v. Ohio, 379 U.S. 89, 97 (1964) 2

Elkins v. United States, 364 U.S. 206, 216 (1960) 6

Hairston v. Hutzler, 331 F. Supp. 251, 253 (W.D. Pa. 1971) aff'd 468 F. 2d 621 (3 Cir. 1972) 10

Henry v. United States, 361 U.S. 98 (1959) 4

Johnson v. United States, 333 U.S. 10, 13-14 (1948) 3

Lankford v. Gelston, 365 F. 2d 197 (4th cir. 1966) 10

Mapp, 367 U.S. at 655 3

Marcus v. Search Warrant, 367 U.S. 717, 724 (1961) 13

McDonald v. United States, 335 U.S. 451, 455-456 (1948) .. 2

Michigan v. Tucker, 417 U.S. 433 (1974) 4

Olmstead v. United States, 277 U.S. 438, 462 (1928) 3

People v. Collier, Supreme Court New York County, Indictment Nos. 3604-05, McQuillan J., July 28, 1975 (unreported) 6

Rice v. Wolff, 513 F. 2d 1280, 1288 (8th Cir. 1975) 4

Silverthorne Lumber Company, 251 U.S. 385, 392 (1920) .. 3

Stanford v. Texas, 379 U.S. 476 (1965) 13

Terry v. Ohio, 392 U.S. 1, 22 (1968) 4

Terry v. United States, 392 U.S. at 13 17

United States v. Calandra, 414 U.S. 338 (1975) 4

United States v. Peltier, — U.S. —, 95 S.Ct. 2313 (1975) .. 4

United States v. United States District Court fot the Eastern District of Michigan, 407 U.S. 297 (1972) 13

Weeks v. United States, 232 U.S. 383, 391-393 (1914) 2

Weeks and Mapp v. Ohio, 367 U.S. 643 (1961) 3

Wolf v. Colorado, 338 U.S. 25, 27-28 (1949) 12

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1974
No. 74-1222

CHARLES L. WOLFF, JR., warden of the
Nebraska Penal and Correctional Complex
Petitioner.

v.

DAVID L. RICE,
Respondent.

On Petition For Writ of Certiorari to the
United States Court of Appeals for the
Eighth Circuit

BRIEF OF NATIONAL ALLIANCE AGAINST RACIST AND POLITICAL REPRESSION AS *AMICUS CURIAE*

This brief of the National Alliance Against Racist and Political Repression (the Alliance) as *Amicus curiae* in support of respondent is filed with the written consents of the parties which have been filed with the Clerk.

THE INTEREST OF THE AMICUS CURIAE

The Alliance, founded in 1973, is a multiracial organization composed of local branches, affiliated national organizations and individual members throughout the United States. Its purpose is to work for the elimination of racist and political repression from our national life by means of activity in the fields of education, legislation and legal defense. It is particularly concerned with manifestations of racism in the criminal process and the penal system.

In this case, the Court is presented with the question among others, of whether the exclusionary rule should be modified so as

to admit evidence obtained in violation of well-established constitutional standards. What the Court does here may have an important impact on the right of minority-group people and political dissenters to be free from unlawful searches which cast in their net indiscriminately, people of color or of unorthodox views. This issue also raises substantial questions affecting First Amendment rights of minority-group people and political dissenters to organize and to engage in lawful political activity, unhampered by illegal police invasions. We argue here solely the constitutional requirement of the application of the exclusionary rule to this case and the importance of maintaining the rule intact. We adopt as our own the arguments so ably made in respondent's brief.

ARGUMENT

I

THE APPLICATION OF THE EXCLUSIONARY RULE IS CONSTITUTIONALLY REQUIRED IN THIS CASE. THE RULE SHOULD NOT BE MODIFIED. ITS SANCTION IS ESSENTIAL TO CONTROL THE ARBITRARY EXERCISE OF POLICE POWER.

Just as distrust of uncontrolled power is at the heart of the Fourth Amendment so distrust of uncontrolled police power is at the heart of the rules devised by the Court in giving content to the Fourth Amendment in criminal cases. Ever since its inception, the rule excluding evidence seized in violation of the Fourth Amendment has been recognized as a principle mode of discouraging lawless police conduct. See *Weeks* v. *United States*, 232 U.S. 383, 391-393 (1914); *Beck* v. *Ohio*, 379 U.S. 89, 97 (1964). Indeed the Fourth Amendment requirement that a magistrate issue the search warrant is also bottomed on this principle. As the Court, in *McDonald* v. *United States*, 335 U.S. 451, 455-456 (1948) said:

> [T]he Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law. The right of privacy was deemed too precious to entrust to the discretion of those whose job is the detection of crime and the arrest of criminals. Power is a heady thing; and history shows that the police acting on their own cannot be trusted. And so the Constitution requires a magistrate to pass on the desires of the police before they violate the privacy of the home.

See also *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948).

The application of the exclusionary rule in this case is constitutionally required. The Court in *Weeks*, 232 U.S. at 393, 398, and in *Mapp*, 367 U.S. at 655, explicitly held that the use of evidence obtained by an illegal search and seizure is barred by the Fourth Amendment. See also *Silverthorne Lumber Company*, 251 U.S. 385, 392 (1920); *Olmstead v. United States*, 277 U.S. 438, 462 (1928).

The exclusionary rule is applicable to this case under well established principles of law. The evidence was obtained in violation of existing standards prevailing at the time of the search. The search was made either 1) under an invalid search warrant issued without probable cause to believe that the objects sought were in respondent's home at the time of the search, or 2) under an arrest warrant for a third person without probable cause to believe that the person sought was in respondent's home at the time of the search.

In practical effect petitioner and its supporting *amici* seek to persuade this Court to overrule its holding, in *Weeks and Mapp* v. *Ohio*, 367 U.S. 643 (1961, that the exclusion of evidence obtained in violation of the accused's Fourth Amendment rights is constitutionally mandated. They urge that the fruits of some unlawful searches and seizures would be permitted in evidence against persons so victimized where the police officer acted honestly and in good faith or where the crime was a serious one and the unlawful search and seizure was accompanied by good intent.

The subjective standards proposed by petitioner and its supporting *amici* eliminate the necessity for scrutiny by neutral magistrates, incites warrantless searches and reinstitutes the general warrant under the shape of an arrest warrant pursuant to which the privacy and homes of third persons are subject to search in the night time on suspicion, speculation or plain "hunch".[1] These standards have no support in law. The Court, in *Beck* v. *Ohio*, 379 U.S. at 97, in rejecting the subjective test of "good faith" conduct said:

> But "good faith on the part of the arresting officers is not enough." Henry v. United States, 361 U.S. 98, 102. If subjective good faith alone were the test of the protection the Fourth Amendment would evaporate, and the people would be 'secure in their persons, houses, papers, and effects' only in the discretion of the police.

Anything less than the application of objective standards in determining whether police conduct meet the requirements of the Fourth Amendment "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches, a result this Court has consistently refused to sanction". *Terry v. Ohio*, 392 U.S. 1, 22 (1968) (citing *e.g.*, *Beck v. Ohio*, 379 U.S. 89 (1964); *Rios v. United States*, 364 U.S. 253 (1960); *Henry v. United States*, 361 U.S. 98 (1959).

Petitioner and their supporters have seized upon what they consider to be a trend by the majority of this Court to downgrade the importance of the exclusionary rule. They rely heavily on language taken out of contest from *Michigan v. Tucker*, 417 U.S. 433 (1974); *United States v. Peltier*, —— U.S. ——, 95 S. Ct. 2313 (1975); and *United States v. Calandra*, 414 U.S. 338 (1975), to suggest that the Court has substituted new tests of

1. The Court below found the search warrant insufficient because the affidavit was primarily based on an informant's tip and there was nothing in the affidavit to show that the "tip was based upon more than mere rumor and speculation." *Rice v. Wolff*, 513 F. 2d 1280, 1288 (8th Cir. 1975). The Court also found that none of the evidence "shows that the police had a firm, concrete and otherwise reasonable belief that Peak was at respondent's house when they entered it." 513 F. 2d at 1292.

bona fides, good faith intentions and honest errors in place of the constitutional standards of probable cause. But these cases have no relevance to the issues here involved.

Peltier and *Tucker* involved the retroactive application of a new constitutional principle in circumstances where police officials had acted in accordance with well-established constitutional norms. The Court held that retroactive application of newly formulated constitutional principles would not be given in cases where police officers, at the time the evidence was obtained, complied with the then accepted constitutional norms. The Court did not abandon the exclusionary rule for good faith police conduct. The decisive standard was the objective one of compliance with the then-existing constitutional norms. It was this compliance which the Court characterized as good faith. Non-compliance with existing constitutional standards, even when accompanied by good faith does not meet the test of *Peltier* and *Tucker*.

In *Calandra*, the Court declined to extend the exclusionary rule to grand jury proceedings, at which questions based on illegally seized evidence were asked, although it deemed that such evidence was not admissible in the criminal trial. The view of the exclusionary rule expressed by the majority in that case was that the deterrent factor was served by the inhibiting knowledge that the fruits of an illegal search and seizure and any derivative evidence, even if used by the grand jury, could not be used in a criminal trial. (414 U.S. at 351-52); the very place where petitioner here seeks sanction for its use.

Petitioner and their supporting *amici* place their major emphasis upon the claim that the exclusionary rule was fashioned primarily as a deterrent and that it has failed in that purpose. They urge that the rule does not operate to prevent the good faith, honest error police officer or the blundering or miscreant police officer from violating the accused's right to be free from illegal searches and seizures. For the good faith and honest error officer could not be deterred from conduct he deemed consistent with the Fourth Amendment even if it was not, and the miscreant officer, in any event, would not be deterred for misconduct.

Petitioner and their supporting *amici* are concerned that the rule permits the guilty to go free and request the Court to scrap it on speculative reliance that other remedies, existing or proposed would be more effective. As this Court noted in 1960 even before *Mapp* was decided, "The exclusionary rule has for decades been the subject of ardent controversy . . . Most of what has been said in opposition to the rule was distilled in a single Cardozo sentence—'The criminal is to go free because the constable has blundered.' " *Elkins v. United States*, 364 U.S. 206, 216 (1960) (quoting, *People v. Defore*, 242 N.Y. 13, 21). It is safe to venture the opinion that this Court has not been free of the controversy since *Mapp* and that at each term of the Court the issue has been presented as though a new urgency was added to the fear that the "guilty" go free.[2]

The debates reflect genuine concern with the effectiveness of law enforcement agencies. The issue, however, is clouded with public partisanship, the most vocal of which is pressed by self-proclaimed proponents of law and order who have distorted its meaning to encompass government lawlessness in the solution of the problem of crime in our cities. They regard decisions of this Court, requiring that law enforcement officers comply with constitutional safeguards, as obstacles to the prosecution and conviction of criminals and urge that we "take the handcuffs off our police".[3] The claim that the rule fetters law enforcement has

2. Once cannot be too sanguine about how many so-called "guilty" who go free are in fact so. We believe that there is always a risk of reliability where evidence is illegally obtained. This is particularly true in cases involving Black Panthers. There has been so much admixture in such cases of informers, provocateurs, government inspired entrapment and planting of evidence including dynamite that we are never certain as to where the evidence had its origins. See e.g. Chevigny, *Cops and Rebels, A Study of Provocation* (1972); *People v. Collier*, Supreme Court New York County, Indictment nos. 3604-05, McQuillan J., July 28, 1975 (unreported) in an opinion granting motion to suppress and dismissing indictment, reported in *New York Times* July 29, 1975.

3. See e.g. Sondern, Take the Handcuffs Off Our Police, *Readers Digest*, Sept., 1964, 64-68, noted by Chief Justice Burger in *Who Will Watch the Watchman?*, 14 Am. U.L. Rev. 1, 22, n. 48 (1964).

been unsuccessfully pressed on the Court since the inception of the rule. See e.g. *Elkins*, 364 U.S. at 218-219; *Mapp*, 367 U.S. at 659-660. In *Mapp* the Court, after noting that "pragmatic evidence of a sort to the contrary was not wanting", rejected that consideration as an "ignoble short cut to conviction . . . [which] tends to destroy the entire system of constitutional restraints on which the liberties of the people rest", 367 U.S. at 659-60.

The emphasis placed on the so-called "failure" of the exclusionary rule as a deterrent misperceives its role in the deterrent process.[4] In the first place, one of the functions of the exclusionary rule is to inhibit improper police invasions which, if allowed, would hit hardest at countless numbers of unknown innocent people who are the most numerous victims of unlawful searches and whose abuse is never brought to the attention of the courts. As this Court said in *Terry v. Ohio*, 392 U.S. at 13 (1968):

> A ruling admitting evidence in a criminal trial, we recognize, has the necessary effect of legitimizing the conduct which produced the evidence, while an application of the exclusionary rule withholds the constitutional imprimatur.

Those who urge modification of the exclusionary rule do not claim that there is no need to deter the police. This is patently clear from their claim that the rule fails to deter. There is general agreement that curbs on police power are necessary. In the second place, the exclusionary rule gives content to the Fourth Amendment by defining the standards of acceptable conduct. *Terry v. United States*, 392 U.S. at 13. Furthermore, while the

4. The claim of "failure" is based on inconclusive data. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 709 (1970), who is frequently cited as authority for the claim, concedes that his findings which "represent the largest fund of information yet assembled on the effect of the exclusionary rule . . . obviously fall short of an empirical substantiation or refutation of the deterrent effect of the exclusionary rule." We do not agree that the rule fails as a deterrent even in the narrow sense used by petitioner. See Amsterdam, *Reflections on the Fourth Amendment*, 58 Minn. L. Rev. 349 at 475-6, n. 593 and authorities cited therein; see also *Elkins v. United States*, 364 U.S. at 218-221. We adopt as our own the arguments on this question made in Brief *Amicus Curiae*, American Civil Liberties Union.

exclusionary rule should never be regarded as the sole deterrent factor, its sanction is the indispensable core of a total system of deterrence which should involve not merely the judiciary, but the cooperation of law enforcement agencies. See Amsterdam, 58 Minn. L. Rev. at 409-434. And finally, as this Court has frequently observed, the elimination or narrowing of the sanction would incite disregard for the rights protected by the Fourth Amendment. See e.g. *Elkins v. United States,* 364 U.S. at 217.

II

MODIFICATION OF THE EXCLUSIONARY RULE IN THIS CASE WOULD INCREASE THE ALREADY EXISTING ABUSE OF THE RIGHTS OF MINORITY GROUP PEOPLE

It is a diversion from the real problems of society to focus in on the exclusionary rule as the cause of crime. The number of "guilty" persons at large because of the exclusionary rule is of no real significance and is hardly the source of crime. The threat is not from too much coddling of criminals but from too much abuse of the rights of the people residing in our "inner cities".

The special abuse by law enforcement agencies of Blacks and other minority group people has a long history.[5] Those residing in the ghettos and other poverty areas of our cities are daily

5. See generally National Capital Area Civil Liberties Union, *A Police Department in Trouble: Racial Discrimination and Misconduct in the Police Department of Washington, D.C.* (1968); and United States Commission on Civil Rights, *Mexican-Americans and the Administration of Justice in the Southwest* (1970). See also President's Commission on Crime in the District of Columbia, *Report,* (1966) at 203-208. Also Wolfgang and Cohen, *Crime and Race,* (1970); Rinella, *Police Brutality and Racial Prejudice: A First Close Look.* 45 J. Urban. L. 773 (1968) and Comment, *Socio-Legal Aspects of Racially Motivated Police Misconduct,* 71 Duke L.J. 751 (1971). Chevigny, *Police Power: Police Abuses in New York City* at 205-206, 208 (1969), (hereinafter *Chevigny*); Cray, *The Big Blue Line* (1967) at 173-176 (hereinafter *Cray*); and Bailey and Mendelsohn, *Minorities and the Police* (1969) at 130-132. We are indebted for the authority cited to Brief *Amicus Curiae* of the N.A.A.C.P. Legal Defense and Educational Fund, Inc., in *Rizzo v. Goode,* October Term, 1975 no. 74-942 now pending before this Court.

subjected by police officers to humiliating and degrading violations of their constitutional rights and their right to be free from arbitrary searches and seizures.[6] The racism inherent in these violations has been widely acknowledged and in fact is frequently accompanied by overt racist verbal as well as physical abuse.[7]

Extensive studies in at least one city disclosed:

> In predominantly Negro precincts, over three-fourths of the white policemen expressed prejudice or highly prejudiced attitudes towards Negroes. Only one percent of the officers expressed attitudes which could be described as sympathetic towards Negroes. Indeed, close to one-half of all the police officers and in predominantly Negro high crime rate areas showed extreme prejudice against Negroes. The National Advisory Commission on Civil Disorders, *Report* at 306, New York Times ed., (1968) quoting the testimony of Professor Albert Reiss.

Illegal searches in the ghettos are commonplace. One authority on the subject noted that "Invasions of privacy, all in the good expedient law enforcement are so common as to be an integral part of police procedure." *Cray,* at 41; see also *Black and Reiss,* at 82, 85, 90; *Chevigny,* at 205-06, 208; The Presidents Commission on Law Enforcement and Administration of Justice: *Task Force Report: The Police* (1967) at

6. See e.g. *The Metcalfe Report on the Misuse of Police Authority in Chicago* The Chicago Defender, July 1973 (Special Supplement at 8); and Silberman, *Crisis in Black and White* (1964) at 50-53.

7. The National Advisory Commission on Civil Disorders, *Report* (New York Times ed., 1968) at 302-306 (hereafter *Report*); Reis, "Police Brutality—Answers to Key Questions", Transaction, at 10-19 (July-August 1968) (hereinafter *Reis*); Black and Reiss, "Patterns of Behavior in Police and Citizen Transactions". II *Studies of Crime and Law Enforcement in Major Metropolitan Areas,* (1967) at 97 (hereinafter *Black and Reiss*); Silberman, *Crisis in Black and White* (1964) at 50-53; United States Commission on Civil Rights, *Mexican-Americans and the Administration of Justice in the Southwest.* (1970), at 8. See *Cray* at 41-44 for graphic illustration of the racist nature of abuse of a Mexican-American woman and her family.

185 (hereinafter, *Task Force Report*); *Hairston* v. *Hutzler*, 331 F. Supp. 251, 253 (W.D. Pa. 1971) *aff'd* 468 F. 2d 621 (3 Cir. 1972).

The line between respect by the police for the individual rights of Blacks and other minority group people and invasion of those rights is so thinly drawn as to be virtually obliterated when an outrageous crime is perpetrated by a minority group person against a white or against police officers. At such times the entire police community become involved in violations of the rights of minority group persons, suspect only because of the color of their skin. And dragnet warrantless searches and seizures become almost routine. See e.g. *Lankford* v. *Gelston*, 365 F. 2d 197 (4th cir. 1966) involving a police search in the Black community in Baltimore, Maryland for suspects in the killing of a police officer. In the course of this search 300 homes were invaded. Similarly in San Francisco in 1974, a police sweep of streets for all black men of designated age and physical characteristics was instituted in search for suspects in the slaying of white people. New York Times, April 19, 1974 p. 1 col. 1, and p. 73 col. 3. A United States District Court Judge found that in the course of this search the constitutional rights of 600 young men had been violated. New York Times, April 26, 1974 p. 1 col. 1.

We do not believe that the numbers of persons subjected to abuse in any particular case is significant. It is the potential of the abuse that is a matter of concern. Moreover the "terrifying" experience to the persons whose homes were invaded as described in *Lankford*, 364 F. 2d at 201, is no less terrifying if only one, two or three persons' homes are invaded. While we appreciate the urgency of finding the suspect of a heinous crime, it is no reason to subject the community or even one of its members to the terror of the search.

The problem surrounding the application of the exclusionary rule is not that such application permits the guilty to go free. Rather, it is that the rule must be so applied as to inhibit the crimes practiced daily by the police on the Black and Brown people of our society, especially in those cases which threaten widespread invasion, such as the "serious" cases which Petitioner seeks to exempt from the exclusionary rule.

There is general agreement that police abuse has exacerbated[8] the existing intolerable conditions of people "confined in ghetto compounds of our cities, and . . . subjected to criminally inferior education, pervasive economic and job discrimination, committed to houses unfit for human habitation, subjected to unspeakable conditions of municipal services such as sanitation . . .". Dr. Kenneth Clark, testimony before the National Advisory Commission on Civil Disorders, quoted in *Report*, at 300.[9] "[P]olice excesses bear the seed of untoward counter reactions of violence." *Lankford*, 364 F. 2d n. 7 at 204. "Courts cannot shut their eyes to the events [of rebellions in the Black communities] . . . It is of the highest importance to community morale that the courts shall give firm and effective reassurances, especially to those who feel that they have been harassed by reason of their color or their poverty." *Id.* at 203-204.

No one would suggest that the high crime rate of our cities are the product of the exclusionary rule. The suggestion, however, is that the exclusionary rule has coddled the criminals by holding the reins tight against police illegal intrusions, and that such coddling must go to preserve law and order. This suggestion wholly ignores the fact that the sanction is designed not only to safeguard the rights of suspects, but also to protect the rights of innocent members of a community who have no connection with the crime but are identified as a suspect and whose rights are invaded solely because of their color or of political affiliation or of pure accident. The spector of the high crime rate among the poor and minority-group people has moved some people to

8. *Report*, at 299-309.

9. The conditions which Dr. Clark described in 1968 have undergone even further deterioration accelerated by the economic crisis, and its accompanying inflation and unemployment. A recent United States Department of Labor report establishes that 37.4% of young Blacks and other (referring to American-Indians and Asians) in the inner cities of the ages of 16-19 were unemployed as of August 1975. U.S. Department of Labor Release, no. 75-491, *The Employment Situation: August 1975*. The same report shows that the unemployment rate among Blacks is 14%, almost twice as high as the rate of Whites. These figures do not include the contingent labor force entrants.

identify the minority-group face as the face of the criminal. Hence the widespread illegal police invasions in these communities meet with little condemnation outside of the communities.

It is those who believe that crime and the minority group are synonomous who have been most vigorous in demanding the abandonment of constitutional safeguards under the rubric of "law and order."[10] But what they seek is the essence of lawlessness and disorder.

We believe that the pressures to eliminate the exclusionary rule reflect in substantial measure a philosophy of law enforcement at odds with the traditions of a democratic society to which we frequently point with pride. In the classic and often quoted words of Mr. Justice Brandeis (*Olmstead v. United States*, 277 U.S. 438, 575 dissenting):

> In a government of laws existence of the government will be imperiled if it fails to observe the law scrupulously. Our Government is the potent, the imnipresent teacher. For good or ill it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy. To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retributions. Against that pernicious doctrine this court should resolutely set its face." (Quoted with approval in *Mapp*, 367 U.S. at 659.)

"The knock at the door, whether by day or by night, as a prelude to search, without authority of law, but solely on the authority of the police" comes perilously close to the experience in Nazi Germany. *Wolf v. Colorado*, 338 U.S. 25, 27-28 (1949).

---

10. One political commentator has perceived in the "law and order" attacks against the decisions of this Court a racist underpinning aimed not only at curbing the rights of minority groups in the ghettos of our cities but also at curbing political dissent. Harris, Reflections: The New Justice, *New Yorker*, Mar. 25, 1972, 44.

III

THE MODIFICATION OR ELIMINATION OF THE EXCLUSIONARY RULE THREATENS FURTHER INCURSIONS ON THE PROTECTIONS OF FREEDOM OF EXPRESSION ERECTED BY THE FOURTH AMENDMENT.

The necessity of the Court to maintain the integrity of the judicial process is particularly high today. And the pressures for shortcuts to convictions induced, to a large extent, by the crises in our cities, are strong. Elimination of the exclusionary rule will not solve the problems of our cities, though it may in fact impair the democratic process at a time when lawlessness and the exercise of uncontrolled and arbitrary power by government agencies and high-placed officials, have already seriously tarnished its image.

The Fourth Amendment has its origins in the English experience and the experience in the colonies. "Historically the struggle for freedom of speech and press in England was bound up with the issue of the scope of the search and seizure power." *Marcus v. Search Warrant*, 367 U.S. 717, 724 (1961). "The Bill of Rights was fashioned against the background of knowledge that unrestricted power of search and seizure could also be an instrument for stifling liberty of expression." *Id.*, at 729. The dangers to First Amendment freedoms posed by the government's abuse of the search and seizure power are no less real in the twentieth century setting. See e.g. *Stanford v. Texas*, 379 U.S. 476 (1965); *United States v. United States District Court for the Eastern District of Michigan*, 407 U.S. 297 (1972). In *District Court*, the electronic listening device had replaced the general warrant of *Entick* as the means of effectuating the unlawful search and seizure. Protection of "domestic security" had replaced censorship of "books, pamphlets and portraitures offensive to the state," *Marcus, supra*, at 725, as the government's justification for its invasions of privacy. Nevertheless Justice Powell invoked the same vlues which Lord Camden had upheld more than three centuries before to affirm the role of the Fourth Amendment as a safeguard of freedom of expression:

> "History abundantly documents the tendency of Government—however benevolent and benign its motives—to view with suspicion those who most fervently dispute its policies. Fourth Amendment protections become the more necessary when the targets of official surveillance may be those suspected of unorthodoxy in their political beliefs." 407 U.S. at 314.

It is generally acknowledged that Black and other minority group organizations, their leaders and members, as well as political dissenters have long been the prime target for government lawless invasions. Some indication of the nature of the group thus attacked and the allege methods used is given by Mr. Justice Douglas, in *District Court,* 407 U.S. at 330 n. 10 (concurring):

> Some insight into the scope of the current use of informers was provided by the Media Papers, F.B.I. documents stolen in early 1971 from a Bureau office in Media, Pennsylvania. The papers disclose F.B.I. attempts to infiltrate a conference of war resisters at Haverford College in August 1969, and a convention of the National Association of Black Students in June 1970. They also reveal F.B.I. endeavors "to recruit informers, ranging from bill collectors to apartment janitors, in an effort to develop constant surveillance in Black communities and New Left organizations (N.Y. Times, April 8, 1971, p. 22, col. 1). In Philadelphia's Black community, for instance, a whole range of building 'including offices of the Congress of Racial Equality, the Southern Christian Leadership Conference [and] the Black Coalition' (*ibid.*) was singled out for surveillance by building employees and other similar informers working for the F.B.I. Note, *Developments In The Law-The National Security Interest and Civil Liberties,* 85 Har. L. Rev. 1130 (1972).

The arrogance of uncontrolled power exerted by the Federal Bureau of Investigation was exposed on March 7, 1974 by the then Attorney General Saxbe when he revealed a four year effort by the Bureau to harass and disrupt Black militant organizations

and to especially prevent leadership from developing, New York Times, March 8, 1974, p. 16 col. 3. The case at bar is but one of the many illegal searches and seizures made against members of the Black Panther Party. See e.g. A Report by the Commission of Inquiry into the Black Panthers and the Police, Chairman, *Search and Destroy* (1973); Chevigny, *Cops and Rebels, A Study of Provocation* (1972).

The modification or abandonment of the exclusionary rule threatens further incursions on the protections of freedom of expression erected by the Fourth Amendment. "The historical judgment, which the Fourth Amendment accepts, is that unreviewed executive discretion may yield too readily to pressure to obtain incriminating evidence and overlook potential invasions of privacy and protected speech." *District Court,* 407 U.S. at p. 317. The attempt by petitioner and its supporting *amici,* to obtain this Court's sanction for the use in a criminal trial of evidence illegally obtained seems to us to be one more assault on the democratic process in the grim chapter of the history of illegal conduct by high government officials and agencies first disclosed in Watergate.

CONCLUSION

THE JUDGMENT OF THE COURT OF APPEALS FOR THE EIGHTH CIRCUIT SHOULD BE AFFIRMED.

Respectfully submitted,

MARY M. KAUFMAN
303 West 66th Street
New York, N.Y. 10023

Attorney for National Alliance
Against Racist and Political Repression

Vicki Erenslein
Of Counsel